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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SENATOR GORDON J. HUMPHREY, *et al.*,
Petitioners,

v.

JAMES A. BAKER, III,
Secretary of the Treasury, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. May Congress, consistent with the Ascertainment Clause and the doctrine prohibiting excessive delegation, constitutionally grant to the President the right to raise or lower the salaries of Members of Congress and other high federal officials to whatever levels he "deems advisable," subject only to Congress' right to enact a statute overriding the President's decision within 30 days of its announcement?

2. May Members of Congress and federal taxpayers maintain an action challenging the constitutionality of a federal statute, as inconsistent with the Ascertainment Clause, that grants to the President the power to decide the salary levels of Members of Congress and other high federal officials?

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*In addition to the parties named in the caption, the following persons appeared in the courts below and are petitioners or respondents in this Court: plaintiffs/petitioners: Representatives Robert C. Smith, Beau Boulter, Jack Davis, Robert K. Dornan, and Clyde C. Holloway, and David L. Keating, Ralph Nader, and the National Taxpayers Union. Defendants/respondents: Walter Stewart, the Secretary of the Senate; Jack Russ, the Clerk of the House of Representatives; and United States District Judges Spencer M. Williams, Solomon H. Blatt, Jr., Robert H. Hall, Diana E. Murphy, Betty B. Fletcher, Thomas C. Platt, Jr., Hubert L. Will, Ralph B. Guy, Jr., Louis C. Bechtle, Jim R. Carrigan and Laughlin E. Waters. The Senior Executives Association, an association of senior federal civil servants, filed a brief as *amicus curiae* in support of the defendants in the district court, but did not participate in the court of appeals.

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OPINIONS BELOW

The opinion of the district court is reported at 665 F. Supp. 23 (D.D.C. 1987) and is reproduced in Appendix C at App. 15a-28a. The opinion of the court of appeals is reported at 848 F.2d 211 (D.C. Cir. 1988), and is reproduced in Appendix A at App. 1a-13a.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1988. App. 14a. Jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES AT ISSUE

Article I, section 1 of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Article I, section 6, clause 1 of the Constitution (the "Ascertainment Clause") provides:

> The Senators and Representatives shall receive a Compensation for their Services to be ascertained by Law, and paid out of the Treasury of the United States.

Article I, section 9, clause 7 of the Constitution provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; . . .

The relevant portions of the Federal Salary Act of 1967, as amended by Pub. L. 99-190, 2 U.S.C. §§ 351-360, are reproduced in Appendix D, App. 30a-35a.

STATEMENT OF THE CASE

This case challenges the constitutionality of the 1985 amendment to the Federal Salary Act of 1967. Under it, the President has the authority to set whatever salary rates he "deems advisable" for Members of Congress, federal judges, and high officials in the executive branch, unless Congress passes a statute overriding his determination within 30 days after he transmits it to Congress. A challenge to an earlier version of the statute was rejected by a three-judge court for the United States District Court for the District of Columbia, and on direct appeal this Court summarily affirmed. *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976), *aff'd*, *Pressler v. Blumenthal*, 434 U.S. 1028 (1978). Because the history of the present law and the ruling in *Pressler* directly bear on the issues presented

in this petition, we review them before turning to the facts surrounding this case and the proceedings in the courts below.

1. *History of Congressional Pay Legislation*

From 1789 through 1967, the pay received by Members of Congress — as well as that of judges, high executive branch officials, and senior legislative employees — was set by Congress, either in terms of an annual salary or in terms of a rate of pay for days worked. In the Federal Salary Act of 1967, Pub. L. 90-206, § 225, 81 Stat. 642 (the "1967 Salary Act"), Congress established a new procedure for setting pay rates for senior federal officials, parts of which remain in effect under current law. One of these was the creation of a Commission on Executive, Legislative, and Judicial Salaries (the "Quadrennial Commission"), consisting of three members appointed by the President, two by the Speaker of the House, two by the President of the Senate, and two by the Chief Justice for a one year term. 2 U.S.C. § 352(1). Every fourth year, the Quadrennial Commission meets to recommend to the President "appropriate" levels of pay for these officials, and "appropriate" pay relationships among them. 2 U.S.C. § 356(i) & (ii).

The President is then required to "recommend" to Congress the "exact rates of pay which he deems advisable, for those offices and positions. . .." 2 U.S.C. § 358. Like the recommendation of the Commission, no standard of "advisability" is set forth in the legislation, nor is the President bound in any way to follow the report of the Commission. His recommendations to Congress may exceed the levels the Commission suggests, or he may drop salaries below prevailing levels; he could, in fact, recommend any level of pay, or any combination for the different branches or among the various positions within a branch, as he thinks appropriate. *Id.*

Finally, under the 1967 Act, the President's recommendations became effective for the first pay period beginning after the thirtieth day following their transmittal to Congress unless, by that date, (a) either House of Congress had "enacted legislation [sic] which specifically disapprove[d] all or part of such recommendations," or (b) Congress passed a statute which established different rates of pay. 2 U.S.C. § 359 (1970). Thus, if either House of Congress opposed the President's recommendations, they did not go into effect.[1]

In 1977, Congress amended the 1967 Salary Act to require that presidential pay recommendations would not become law unless affirmatively approved by roll call votes in both Houses of Congress within 60 days of their transmittal. Pub. L. 95-19, § 401, 91 Stat. 45 (the "1977 Amendment"). Through this provision, which was enacted in the midst of the *Pressler* litigation, Congress intended to recapture greater authority over its own pay. Its sponsor, Senator Bartlett, put it this way:

> On virtually every other type of question to come before the Senate, we take a position. But on pay increases for ourselves and others, we do not. It is the same folks who pay the bills in either case. It seems to me that the same procedure should apply.

123 Cong. Rec. 9662 (1977).

1. At that time, Congress retained an additional check on Members' salaries through its control of the appropriations process. Thus, even where, under the 1967 Salary Act or other law, Congress was entitled to a pay raise, it did not receive one unless it appropriated the money, which it did not do on several occasions. *See*, Library of Congress, Congressional Research Service, "A Brief History of Congressional Pay Legislation," January 8, 1987. In 1981, however, Congress relinquished this power by providing that the funds necessary for Members' compensation would be drawn from a special permanent appropriation not subject to annual vote. Pub. L. 97-51, § 130(c), 95 Stat. 966 (1981).

Meanwhile, in 1976, then Congressman and now Senator Larry Pressler filed suit challenging the constitutionality of the 1967 Act and the 1975 extension of the Salary Adjustment Act, which provides for annual cost-of-living increases to executive branch employees, to cover Members of Congress. 2 U.S.C. § 31. A three-judge district court upheld Congressman Pressler's standing as a legislator to maintain the action, but ruled against his claim under the Ascertainment Clause, Art. I, § 6, cl. 1, which requires that congressional salaries "be ascertained by law." *Pressler, supra*, 428 F. Supp at 305-06. Congressman Pressler's position was that all changes in congressional salaries had to be voted on by Congress, including even mechancial cost-of-living adjustments. *Id.* at 303. Relying principally on the fact that either House, acting through a legislative veto, could prevent the President's recommendations from taking place, and noting also the express reservation of the right of Congress to enact other legislation altering the President's recommendation, and Congress' power through the use of the appropriation process to block a pay increase, the court sustained the statute's constitutionality. *Id.* at 305-06. In doing so, the court based its holding on the fact that Congress retained "ultimate responsibility" for any pay increases that it received. *Id.* at 306.

On direct appeal, this Court vacated the lower court decision and remanded it for consideration in light of the subsequently enacted 1977 Amendment which the Court concluded "will alter materially the scope and perhaps the nature of appellant's suit . . .." *Pressler v. Blumenthal*, 431 U.S. 169 (1977). On remand, the district court adhered to its prior ruling, and this Court summarily affirmed, with Justice Rehnquist noting that affirmance should not be construed as an agreement that the plaintiff had standing to maintain the action. 434

U.S. 1028 (1978). Thereafter, in 1983, this Court ruled in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, that the legislative veto device was unconstitutional. As a result, if Congress wished to amend the 1977 statute, under which affirmative approval of both Houses was required before any presidential pay recommendation could go into effect, it could no longer revert to the veto as a check against presidential recommendations of which it disapproved.

With the law in this posture, Congress took up the issue of amending the Salary Act in 1985. With no committee consideration, floor debate, or record vote in either House, Congress adopted three recommendations made by the 1985 Quadrennial Commission:

> — The President would transmit recommendations to a special, one-time-only Interim Commission, and a special, one-time-only, Interim Commission, and again in January 1989.
>
> — The President's recommendations would take effect unless disapproved by Congress within thirty days of their transmittal to Congress.
>
> — Congressional disapproval of the President's pay proposals would take the form of a bill requiring passage by *both* Houses and either the President's signature, or the override of a near certain Presidential veto.

The law embodying this amendment, section 135 of the Further Continuing Appropriations Act of 1985, Pub. L. 99-190, is 142 pages in the Statutes at Large (99 Stat. 1185-1326). The amendment itself occupies less than one page, *id.* at 1322-23, is contained in the Title of the Act called "General Provisions," is not listed by subject matter in any index, and is not understandable without reading it in conjunc-

tion with the affected portions of Title 2. As a result, few Members of either House were even aware of this radical change in the way congressional pay would be set, let alone can they be said to have agreed to it after careful deliberation.

As a result of the 1985 Amendment, the President's "recommendation" becomes effective at the beginning of the first pay period following the expiration of 30 days from its transmittal to Congress (as part of the budget message sent in early January), unless the recommendation "is disapproved by a joint resolution agreed to by the Congress not later than the last day of the 30-day period. . . ." 2 U.S.C. § 359(1). The requirement for a record vote on the President's recommendations was eliminated, and the process placed a major new affirmative burden on Congress to pass a law to halt the President's pay recommendations. Thus, prior to 1985, a majority of one in either House of Congress could prevent the President's recommendations from becoming law — the same rule which prevailed under the 1967 Act and the 1977 Amendment, and which prevails in the case of any bill presented for congressional consideration. After 1985, however, Congress could prevent a President from implementing his recommendations only by mustering a two-thirds majority in both Houses — the vote required to override a presidential veto.

2. *The 1987 Pay Increase*

On December 15, 1986, the special Interim Commission created by the 1985 Amendment recommended to the President that congressional pay be raised from $77,400 (the Members' January 1987 salary, which included a 3% cost of living increase to be received in that month) to $135,000 per annum — an increase of 74%. It also recommended substantial pay increases for federal judges and for high level executive branch officials.

Thereafter, on January 5, 1987, the President included in the budget that he transmitted to Congress, his "recommendations" for "the exact rates of pay which he deems advisable. . ." for the various offices and positions affected. 2 U.S.C. § 358. As under the prior law, he was bound by no legislative standards in making these "recommendations" to Congress, other than that he "deem" them "advisable." However, under the 1985 Amendment, Congress surrendered its duty to vote on those increases, and hence the President's "recommendations" would become law unless Congress overrode them in 30 days.

Although the President could have adopted the Commission's proposal of an annual salary of $135,000 for Members of Congress, or gone even higher, he instead "recommended" an increase of $12,100 to $89,500, with higher levels for the Speaker of the House, President Pro Tempore of the Senate, and majority and minority leaders of both bodies. *See* 52 Fed. Reg. 4125 (Feb. 10, 1987) (the "President's Recommendations"). He gave no reason for choosing those levels of pay or the ones he recommended for other covered positions. In fact, despite the Commission's admission that it "had insufficient time to analyze and review the appropriateness of the 'relationship between and among' the respective positions covered by its mandate . . ." (Interim Commission Report, at 5), the President, without explanation, altered those relationships. For example, prior to 1987, the Speaker of the House earned $100,800, and Associate Justices of this Court earned $107,200 per year. The President reversed that relationship, awarding the Speaker $115,000 per year (a 14.8% increase), while raising the Justices just 2.6% to $110,000.

Within the statutory 30 days provided in 2 U.S.C. § 359(1), the Senate voted to reject the entire pay increase, 133 Cong. Rec. S1366 (daily ed., Jan. 29, 1987), but the House did not

vote within that period. The House did vote to disapprove the increases, but waited to do so until February 4, 1987, knowing that the 30 day period had expired and that the vote had no legal effect. *Id.* at H541-48. Therefore, because Congress' role under the 1985 Amendment is solely a negative one, Members of Congress were able to obtain substantial pay increases for themselves, but did not have to vote for them.

3. *Proceedings Below*

The complaint for declaratory and injunctive relief was filed on January 20, 1987, and an amended complaint was filed on March 12, 1987, both alleging that the statute violated the Ascertainment Clause and constituted an excessive delegation of legislative authority. Jurisdiction was based on 28 U.S.C. § 1331. Petitioners-plaintiffs are six Members of Congress (including two who were first elected after the 1985 Amendment was enacted), two individual taxpayers, and the National Taxpayers Union, an organization representing approximately 150,000 American taxpayers. Respondents-defendants are the executive and legislative branch officials responsible for implementing the 1987 pay increases for Members of Congress and other recipients of them, and eleven federal judges who intervened to support defendants.

On cross-motions for summary judgment, the district court, relying largely on the decision in *Pressler*, found that Members of Congress had standing as legislators to sue to enforce the duties assigned to them under the Ascertainment Clause. App. 20a. It also ruled that they were not barred from maintaining this action by the doctrine of equitable discretion because no other person besides a legislator could maintain this action. App. 21a-22a. Indeed, petitioners had conceded in their brief that, because of *Richardson v. Kennedy*, 313 F. Supp. 1282

(W.D. Pa. 1970), *aff'd*, 401 U.S. 901 (1971), they could not obtain taxpayer standing under the Ascertainment Clause, but expressly reserved their right to urge this Court to overturn or limit that precedent. Moreover, they recognized that their standing as legislators and taxpayers under the Ascertainment Clause applied only to the salaries of Members of Congress, but argued that the increases for other salaries covered by the 1985 Amendment were inseverable from those for Congress.

On the merits, the district court was quite sympathetic to petitioners' arguments: "It is unlikely that the Founding Fathers would have proposed to leave to the President the absolute power to fix congressional (or for that matter) judicial salaries or would have authorized Congress by law to delegate such power to a President." App. 19a. But, despite its belief that the Framers never authorized the Congress to enact a law such as the 1985 Amendment, it felt constrained by the decision in *Pressler* to sustain the statute. App. 23a-25a.

The Court of Appeals affirmed. It did not dispute that the congressional plaintiffs had standing to maintain this action, but, despite *Pressler*, *supra*, it ruled that under the District of Columbia's Circuit's self-created doctrine of equitable discretion, it could not reach the merits of the controversy, relying principally on the court's recent decision in *Melcher v. Federal Open Market Committee*, 836 F.2d 561 (D.C.Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988). Although it indicated that all members of the panel continued to be troubled by the doctrine, it concluded "that the District Court was obliged to dismiss the suit under the doctrine of equitable discretion." App. 8a.

Nonetheless, it proceeded to decide the merits of the controversy and sustained the constitutionality of the statute. Even though it previously found that the 1976 decision in *Pressler*

was not controlling on the right of Members of Congress to maintain a lawsuit such as this, it found that same decision controlling on the merits, despite the fact that the statute had been radically altered by the deletion of the legislative veto in 1977. It concluded that the "basic structure specifically approved in *Pressler* thus remains in force today . . ." and that "[a]ny post-*Chadha* tinkering with that structure has, in our view, been insignificant in relation to the overall scheme." App. 12a. It then dealt briefly with the delegation argument, finding that there was no excessive delegation because the Quadrennial Commission "was established to provide guidance to the Chief Executive," even though he was free to and in fact did largely reject its recommendations, and because "Congress is afforded the opportunity explicitly to reject or modify any or all of the President's recommendations before they go into effect," which is, of course, true for virtually every other delegation. App. 13a.

REASONS FOR GRANTING THE WRIT

1. The Constitutionality of the 1985 Amendment to the Federal Salary Act Is An Important Question.

Congress enacted, and the D.C. Circuit upheld, a law that radically alters the allocation of spending power regarding federal salaries. Under our constitutional scheme, Congress enacts the laws, and under Article I, § 9, cl. 7, no money may be spent for any purpose except pursuant to a duly enacted appropriations law. In addition, under the Ascertainment Clause, a specific duty is imposed on Congress to make a judgment as to the appropriate amount of salary for its Members, *i.e.*, it is required to "ascertain" a level that is neither too much for the benefits conferred, nor too little to attract qualified Members. The Salary Amendment of 1985 fundamentally

reverses this constitutionally-prescribed system. Instead of Congress being in control and accountable to the electorate when it receives pay increases, the President sets the amounts of congressional salaries. Congress' only role is to pass a statute overriding the President's determination within 30 days of its transmittal if it disagrees with him. As a result of the 1985 Amendment, Members of Congress did nothing in 1987 to "ascertain" their salaries, but simply became the silent beneficiaries of the President's decision to increase their pay.

Over eleven years ago, this Court was asked to review a challenge to the 1967 Salary Act, which is the predecessor of the 1985 Amendment. After the appeal in *Pressler* was docketed in this Court, there was a major change in the statute, under which Congress substituted for the prior one-House veto system, a two-House approval system. This Court observed that it appeared that the change "will alter materially the scope and perhaps the nature of the appellant's suit . . ." and hence vacated the decision and remanded it for further consideration in light of the change. 431 U.S. at 169. On remand, the district court adhered to its earlier ruling, and this Court summarily affirmed. 434 U.S. 1028 (1978).

In assessing the effect of *Pressler*, it is essential to keep several factors in mind. First, the challenge was rejected there because the district court ruled that the Ascertainment Clause was not burdened by "the inflexibility and rigidity which plaintiff seeks," 428 F. Supp. at 306, under which even cost-of-living adjustments would be unconstitutional. Petitioners here, by contrast, do not contend that the Ascertainment Clause is inflexible, and agree that it allows cost-of-living and other objectively determinable pay increases, so long as the formula can be "ascertained" from the statute.

Second, Congressman Pressler sought only prospective relief (*see* Jurisdictional Statements in No. 76-1005 at 22, and in No. 77-450 at 31), but by the time of this Court's summary affirmance, the 1967 Salary Act had been superseded by the 1977 Amendment, under which both Houses of Congress would have to approve pay increases, thereby satisfying the requirements of the Ascertainment Clause. However, the Court could not have properly dismissed the appeals as moot, as the House and Senate had urged in No. 76-1005, because Congressman Pressler was also challenging the cost-of-living adjustments under the Cost-of-Living Adjustment Act, 2 U.S.C. § 31, which still did not require congressional approval before they went into effect. Thus, the summary affirmance can be properly taken as no more than an agreement with the district court that the Ascertainment Clause did not impose such rigidity as to render cost-of-living adjustments unconstitutional. Finally, Congressman Pressler's claim was based solely on the Ascertainment Clause, and it never focused on the "deems advisable" language which petitioners contend not only violates the Ascertainment Clause, but also violates the prohibition on excessive delegation.

Moreover, even if the summary affirmance were viewed as a decision on the merits of the 1967 and 1977 Salary Acts, it would not control this case because, under both the 1967 and 1977 statutes, either House of Congress could have prevented a presidential recommendation from going into effect by a simple majority vote. However, under the 1985 Amendment, a majority of both Houses of Congress with the President's assent, or most likely, two-thirds of both Houses over his veto, must approve a statute, and do so within 30 days, in order to stop the President's recommendations from becoming law. Thus, the veto, which was the only significant congressional control over the President that was available to answer the previous Ascertainment Clause challenge, has

been removed from the statute, and it would now be unconstitutional if it had not been. Accordingly, Congress' only role in ascertaining its own salaries under the 1985 Amendment is to pass a statute overriding a presidential determination, a "right" which it always has, even without a specific reference in a statute. Because the ascertainment of legislative salaries was considered to be of such importance as to merit a specific provision in the Constitution, the constitutionality of this revolution in the setting of congressional salaries, as approved by the court of appeals, is an issue worthy of this Court's review.

Two other features of the law make review by the Court particularly appropriate. First, the system is designed to reduce to a minimum — if not eradicate entirely — any political accountability for the decision to raise congressional pay. Beyond the ability of Congress to gain a pay increase without having to vote for it, the statute is designed to make even the act of not voting into a seemingly reasonable one. Thus, Congress has only 30 days to act, and as the events of 1987 demonstrate (when a disapproval passed both Houses, but not within 30 days), there are enormous practical difficulties in passing a bill in both Houses and having it become law in 30 days, especially since it will be necessary to secure an override of the inevitable Presidential veto. Therefore, it is entirely possible for Members to vote to reject a pay increase, with the virtually certain knowledge that they will never have to accept lesser sums than the President has provided. Moreover, even those House Members who support an increase will not have to run for nearly two years — the maximum potential time under the Constitution to allow citizens to forget what occurred — and Senators will not have to run for nearly two years, with one-third for not having to run for nearly four, and one-third for nearly six years after the vote takes place.

Moreover, other than in 1987, which was a specific exception provided for in the 1985 Amendment, pay decisions occur at the very end of a President's term and are presented to Congress at the moment that Congress is being organized for the new session. Because of this timing, and because the President's decision will always occur after an election in which he is either reelected, defeated, or did not run, even an incumbent who is reelected, and then grants large increases, will never have to defend his decision in another election because of the two-term limitation on presidential service. Furthermore, a lame-duck President, if he were so inclined, could raise the pay of federal judges and high executive branch officials substantially, a little, or not at all, depending on whether he wished to encourage or discourage quality people from accepting those positions, *i.e.*, depending on which party prevailed in the election. He could also refuse to raise the pay of Members of Congress while granting other increases, knowing that he would never have to deal with Congress again.

Second, even apart from the Ascertainment Clause, the terms of the delegation to the President are more open-ended than in any law which this Court has reviewed since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The President receives a report from the Quadrennial Commission, but he is entitled, as he did in 1987, to reject the Commission's recommendations and to make any changes he "deems advisable." Thus, Congress has surrendered to the President the power to raise pay, or, except for federal judges, to lower it; to raise some salaries and not others; or, as he did in 1987, to change the historic salary relationships between the branches in whatever way he believes is "advisable." Congress did not even require him to follow a standard of comparability with private enterprise, but if it had, there are, in reality, no positions that are remotely comparable to Members of Congress or federal judges, and very few that

are comparable to high positions in the executive branch. In short, Congress gave the President unbridled discretion to do anything that he wants about pay for high level federal officials, with no direction at all from Congress.

The question that this Court is being asked to review is whether, under our system of checks and balances and separation of powers, and in particular under the doctrines of excessive delegation and the Ascertainment Clause, this arrangement is constitutional, *i.e.*, in the words of *Pressler*, whether "Congress has retained this ultimate responsibility" as the Ascertainment Clause requires. 428 F. Supp at 306. If, as the court of appeals held, it is constitutional, then Congress could also allow the President to draw money from the Treasury to assure such levels of national defense spending he "deems advisable," to set whatever rates of taxation he "deems advisable," or to fix the levels of Social Security payments or the amount due welfare recipients under that same standard, to name a few of the most directly analogous powers that could be shifted in this way. Any decision which has that kind of potential for fundamentally altering our system of government deserves further review by this Court.

Finally, this Court has not set aside a statute on delegation grounds since *Schecter Poultry* was decided in 1935. Some Members of the Court have suggested the doctrine of undue delegation is "moribund," *National Cable Television Ass'n v. United States*, 415 U.S. 336, 353 (1974) (Marshall, dissenting), while others have rejected that view and concluded that the doctrine retains vitality, *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 675 (1980) (Rehnquist, concurring); *id.* at 646 (Stevens); *National Cable Television, supra*, 415 U.S. at 342 (Douglas). If the doctrine is to be interred, the time has come to say so. Indeed, if this statute contains an "intelligible principle," as that term was

used in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), and the numerous cases that have applied it, then there is no statute that will not meet that test, and this Court should formally announce the end of all litigation over the excessiveness of legislative delegations.

2. The Right of Legislators and Taxpayers to Challenge Violations of the Ascertainment Clause Is An Important Question.

The second question also merits review because it presents the Court with an opportunity to answer two related questions: whether Members of Congress may sue to test the constitutionality of statutes which directly affect their rights and responsibilities as legislators, and whether the grant of taxpayer standing in *Flast v. Cohen*, 392 U.S. 83 (1968), extends beyond the Establishment Clause to include other specific constitutional controls on the congressional appropriation power, in particular those found in the Ascertainment Clause. Both questions are important, albeit for different reasons.

a. In recent years there have been a significant number of lawsuits by Members of Congress in their official capacities. Some, but not this one, have been directed at actions taken by the Executive Branch, alleging violations of statutes and/or the Constitution. Others, such as this, have challenged actions of the legislative branch, generally, but not always, as here, in the form of a test of the constitutionality of a duly enacted statute.

In a series of cases in the second category, the District of Columbia Circuit, where most of the cases have been brought, held that Members of Congress have standing when they allege institutional injuries to their interests as Members, generally, but not always, denying them the right to vote. However,

the court has developed a doctrine unique to the D.C. Circuit, known as equitable discretion, under which it has declined to decide the merits of many of these cases when the plaintiffs could obtain relief from their fellow legislators by passing a law repealing or amending the challenged statute. Originally, the doctrine seemed to bar relief only when another plaintiff beside a Member of Congress had standing to maintain such an action. *See Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881-82 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), and *Moore v. U.S. House of Representatives*, 733 F.2d 946, 955-56 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). However, in December 1987, a panel of the D.C. Circuit, apparently speaking for the entire court, announced that the doctrine would be applied whether or not any other person had standing to maintain the action and stated that it would be "an abuse of discretion" for the court to reach the merits when Members of Congress could obtain relief from Congress itself. *Melcher v. Federal Open Market Committee*, *supra*, 836 F.2d at 565 and n.3.

In this case, however, while purporting to follow *Melcher*, and while stating that the doctrine applies and that the district court should have dismissed the suit without reaching the merits, the court nonetheless went on to decide the merits and upheld the statute. As a result, the D.C. Circuit has announced a doctrine which allows it to decide the merits or not, apparently depending on which result the panel prefers. This doctrine has also been criticized by Judge Bork, albeit for very different reasons in *Barnes v. Kline*, 759 F.2d 21, 41, 59-61 (D.C. Cir. 1984), *vacated as moot sub nom. Burke v. Barnes*, 107 S. Ct. 734 (1987), and both the panel in *Melcher*, 836 F.2d at 565 n.4 and *id.* at 565-66 (Edwards, concurring), and in this case (App. 8a) have expressed reservations about it. The Third Circuit has declined to adopt it in the only non-D.C. Circuit case of which we are aware that deals with the issue directly.

Dennis v. Luis, 741 F.2d 628, 633 (1984). Although separate from the doctrines of standing and political question, it has the same gate-closing effect. Since the doctrine is one of continuing controversy, has never been passed upon by this Court, and is subject to the kind of abuse illustrated by the panel result here, it should be reviewed by this Court.

b. The taxpayer standing issue is also important because it presents the question of whether taxpayers have standing to challenge spending statutes alleged to violate any provision of the Constitution other than the Establishment Clause. Nothing in *Flast* or this Court's recent decision in *Bowen v. Kendrick*, 108 S. Ct. 2562, 2579-80 (1988), imposes any such limitation, but no case has ever allowed taxpayer standing outside the Establishment Clause. Indeed, in 1970, this Court summarily affirmed a ruling of the three-judge district court denying taxpayer standing in a challenge to the 1967 Salary Act, just two years after *Flast* was decided. *See Richardson v. Kennedy*, 313 F. Supp. 1282 (W.D.Pa. 1970), *aff'd*, 401 U.S. 901 (1971).

This case is particularly appropriate for dealing with this issue. The underlying substantive basis of petitioners' claim is the Ascertainment Clause, which was clearly intended to protect taxpayers by requiring Members of Congress to vote on their own salaries. The Framers carefully considered other options and decided that the proper way to balance the interest in having large enough salaries to attract quality legislators, and not to pay the elected officials too much, was to require that Congress vote so that the Members are held politically accountable to the taxpaying public for their actions. *See Pressler, supra*, 428 F. Supp at 306. Thus, there can be little debate that taxpayers are intended beneficiaries of the limits on spending of appropriated funds under the Ascertainment Clause.

The Clause would otherwise seem to fit the *Flast* test for taxpayer standing because it is limited to congressional appropriations and because it contains more specific limitations than those found in Art. I, § 9, cl. 7. Since the Clause applies only to congressional pay, the number of lawsuits that it would allow would be very small. Indeed, if taxpayer standing is not available here, it is difficult to imagine what provision of the Constitution other than the Establishment Clause would provide a basis for taxpayer standing. And, because of the prior affirmance in *Richardson*, only this Court can address the issue, and therefore this action presents a unique opportunity to review this particular question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 26, 1988

Attorneys for Petitioners

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5310

GORDON J. HUMPHREY, SENATOR, et al., APPELLANTS

v.

JAMES A. BAKER, SECRETARY OF THE TREASURY, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-00128)

Argued April 29, 1988

Decided May 31, 1988

William C. Lane, with whom *William A. Strauss* and *Alan B. Morrison* were on the brief, for appellants.

Janina Jaruzelski, Assistant Counsel to the Clerk, United States House of Representatives, with whom *Steven R. Ross*, General Counsel to the Clerk and *Charles Tiefer*, Deputy General Counsel to the Clerk, United States House of Representatives, were on the brief, for appellee the Honorable Jack Russ, Sergeant at Arms.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Morgan J. Frankel, Assistant Senate Legal Counsel, with whom *Michael Davidson*, Senate Legal Counsel, *Ken V. Benjamin, Jr.*, Deputy Senate Legal Counsel, *Susan B. Fine*, Assistant Senate Legal Counsel, *Kevin M. Forde* and *Richard J. Pendergast* were on the joint brief, for appellees Secretary of the Senate and Intervenor Judges.

John R. Bolton, Assistant Attorney General, *Jay B. Stephens*, United States Attorney and *Douglas Letter*, Attorney, Department of Justice, were on the brief for appellee, Secretary of the Treasury. *Robert E. Kopp*, Attorney, Department of Justice, also entered an appearance for appellee, Secretary of the Treasury.

Before: WALD, *Chief Judge*, and EDWARDS and STARR, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* STARR.

STARR, *Circuit Judge*: Senator Gordon Humphrey and five Members of the House of Representatives appeal from the District Court's dismissal of their attack on the constitutionality of the Federal Salary Act of 1967, as amended.[1] The case raises once again questions concerning the doctrine of equitable discretion, a principle that guides the courts of this circuit in determining whether suits brought by Members of Congress can appropriately be entertained.

I

This litigation represents a challenge to the manner in which salaries for Members of Congress are established.[2] The mechanism for determining those salaries

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[1] The plaintiffs in the action included the National Taxpayers Union and two individual taxpayers, David L. Keating and Ralph Nader. The District Court concluded, however, that the taxpayer plaintiffs lacked standing. *See Richardson v. Kennedy*, 313 F.Supp. 1282 (W.D. Pa. 1970) (three-judge court), *aff'd*, 401 U.S. 901 (1971). That conclusion has not been challenged on appeal.

[2] As we shall note below, the statute at issue in this case provides the mechanism for setting salaries for the federal Ju-

derives from the Federal Salary Act of 1967, Pub. L. 90-206, § 225, 81 Stat. 613, 642 (1967), *codified at* 2 U.S.C. §§ 351-361 (1982) (as amended). The 1967 statute represented a significant departure from the historical practice of establishing the levels of pay for Members of Congress. From the founding of the Republic until 1967, Congressional pay was determined directly by Congress, in specific legislation setting specific rates of pay. The involvement of the Article II Branch took the customary, limited form of recommending legislation and, if the President approved, signing it into law.

This historic practice underwent a fundamental reordering by virtue of the 1967 statute, as amended in 1985. The new structure for setting Congressional pay ushered in by the Salary Act was aptly summarized by the District Court:

> In essence, the 1967 Act, as amended, authorizes the creation once every four years of a Commission, members of which are appointed variously by the President, the Chief Justice, the Speaker of the House and the President of the Senate for a term of one fiscal year. The Act requires the Commission to review the rates of pay of, among others, Senators, Congressmen, Justices, and other federal judges, as well as high ranking officials of the Executive Branch. The Commission is supposed to submit to the President a report of the results of each review. The President, in turn,
>
> > is required to include, in the budget next transmitted . . . by him to the Congress after the

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diciary and certain senior Executive Branch officials, as well as Members of Congress. The plaintiffs' substantive challenge is focused, however, on the Congressional pay issue; the only allegations of illegality with respect to Judicial and Executive Branch salaries are that the provisions for setting those salaries are non-severable from the rest of the statute and must fall along with the mechanism for setting Congressional pay. In view of our disposition of the challenge to the Congressional pay issue, we need not reach the severability question.

> date of the submission of the report and recommendations of the Commission . . . his recommendations with respect to the exact rates of pay which he deems advisable . . . .
>
> The recommendations of the President become effective and are to be printed in the Statutes at Large and the Federal Register unless during the 30-day period following the transmittal of these recommendations Congress enacts a joint resolution disapproving the recommendations or enacts a statute establishing rates other than those proposed by the recommendations.

Memorandum Opinion at 1-2, Joint Appendix (J.A.) at 43-44 (citation and footnote omitted.)

In the wake of a pay increase that went into effect in early 1987, Senator Humphrey and his co-plaintiffs initiated this action in federal district court. In their view, the statutory mechanism created by the Salary Act ran afoul of the Ascertainment Clause of the Constitution. That provision, found at Article I, Section 6, Clause 1, provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.

In addition to their Ascertainment Clause challenge, plaintiffs contended that the Salary Act's conferral upon the President of authority to set salary amounts as the President "deems advisable" was violative of the nondelegation doctrine informing our system of separated powers. The plaintiffs assert "that none of the delegations previously condoned by the appellate courts was so sweeping nor the standard so broad and subjective as that evidencing delegation to the President of the power to fix such salaries as he deems 'advisable.'" Memorandum Opinion at 4-5, J.A. at 46-47. *See* 2 U.S.C. § 358 (President to recommend the "exact rates of pay which he deems advisable").

On cross-motions for summary judgment, the District Court concluded that the Congressional plaintiffs enjoyed standing by virtue of *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976) (three judge court), *aff'd sub nom. Pressler v. Blumenthal*, 434 U.S. 1028 (1978), a case which will loom large in our subsequent analysis. The court further concluded that the doctrine of "equitable discretion" articulated by this court in *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), did not counsel in favor of dismissal of the legislators' action, because no private plaintiffs would be available to carry on the suit. *Riegle* had intimated in dicta that the inability of private plaintiffs to bring suit would render the doctrine of equitable discretion inapplicable; in circumstances, as here, where private plaintiffs were wanting, Congressional plaintiffs might therefore be permitted to maintain the suit. In his memorandum opinion, Judge Oberdorfer acknowledged that this court's post-*Riegle* cases had failed to consider the availability of private plaintiffs in determining whether the court should exercise equitable discretion. Exercising caution, however, the District Judge went on to conclude: "In the absence of a more explicit directive from the Supreme Court or the Court of Appeals, this Court should not exercise its 'equitable discretion' in a manner that would effectively preclude judicial review of an important challenge to an Act of Congress." Memorandum Opinion at 9.[3]

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[3] The District Court made this statement without the benefit of our decision in *Melcher v. Federal Open Market Committee*, 836 F.2d 561 (D.C. Cir. 1987) *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 17, 1988) (No. 87-1546), which issued after the trial court's decision. In *Melcher*, we expressly rejected *Riegle's dicta* with respect to the relevance of the presence (or availability) of private plaintiffs, and held that the separation-of-powers concerns informing the doctrine of equitable discretion (*i.e.*, the inadvisability of calling on the judiciary to intervene in entirely intra-Congressional

In deciding the merits, the District Court viewed Congress' retention of power, both within the 30-day statutory period and thereafter, to displace or supercede the President's recommendations, as bringing the amended statutory mechanism within the protective holding of *Pressler v. Simon*, *supra*, which upheld the 1967 Salary Act's structure against Ascertainment Clause challenge. As Judge Oberdorfer felicitously put it in his opinion, the remaining control enjoyed by the Article I branch over the terms of its own compensation "precludes a meaningful distinction of *Pressler*." Memorandum Opinion at 12. *Pressler* was therefore deemed controlling, and mandated rejection of Senator Humphrey's contention on the merits.

II

In our view, our recent decision in *Melcher v. Federal Open Market Committee*, *supra*, 836 F.2d 561, makes it clear that it would constitute an abuse of discretion for the judiciary to allow Senator Humphrey and his House colleagues to maintain this suit. *See supra* n.3. *Melcher* reaffirmed the law of this circuit, namely that the doctrine of equitable discretion applies in suits where legislators bring "to the courthouse what amounts to a dispute properly within the domain of the legislative branch." *Melcher*, 836 F.2d at 563. That is the case here. Whatever the practical difficulties and political realities, Senator Humphrey and his co-plaintiffs have readily at hand, as Judge Oberdorfer correctly observed, an "in-house" remedy within the meaning of this court's decision in *Riegle v. Federal Open Market Committee*, *supra*, 656 F.2d at 879. Under the doctrine of equitable discretion, the availability of an internally available remedy to Members of Congress means that it would be an abuse of discretion for the judiciary to entertain the action. *Melcher*, *supra*, 836 F.2d at 565. And, as we noted above, *see supra* n.3, *Melcher* resolved any *Riegle*-

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disputes) were not affected by the unavailability of private plaintiffs. *Id.* at 565 & n.3.

spawned ambiguity over the relevance of the availability (or not) of private plaintiffs.[4]

We are fully mindful, however, that this circuit's recently minted doctrine of equitable discretion has not even been addressed, much less endorsed, by the Supreme Court. Moreover, several members of this court have previously expressed concern over whether equitable discretion represents "a viable doctrine upon which to determine the fate of constitutional litigation." *See Melcher, supra*, 836 F.2d at 565 (Edwards, J., concurring); *see*

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[4] Appellants argue that *Powell v. McCormack*, 395 U.S. 486 (1969), requires us to hear this case. We do not agree. *Powell* held justiciable a controversy between one Member of Congress and his House colleagues. Although the Court heard and decided the merits of Powell's constitutional challenge to the House's refusal to seat him, the case simply has nothing to do with this circuit's doctrine of equitable discretion. We do not hold that appellants lack standing or that this case is nonjusticiable; rather, we choose to exercise our equitable discretion not to resolve this controversy, the proper resolution of which we believe appropriately lies elsewhere. Moreover, *Powell* involved quite a different situation from the present one. There, Congressman Adam Clayton Powell was being singled out for disfavorable treatment by his House colleagues; here, on the other hand, every Member of Congress is being treated exactly the same.

Appellants make one further argument to save their challenge from the doctrine of equitable discretion. They argue that a legislative remedy was not available to several of the named plaintiffs who were freshmen Members when the 1987 salary increases were effected. They argue that it was unrealistic to expect these new Members to resort to the legislative process so early in their tenure. We do not doubt that the legislative remedy for appellants' grievance would be difficult to achieve; that, we suspect, is why they are in court. But the remedy is nonetheless available. As to its efficacy, we merely note that the Congress passed a disapproving resolution with respect to the 1987 salary increase, but failed by one day to do so within the 30-day statutory time period. We doubt, therefore, whether it is truly unrealistic to think that the process could not have been advanced by one day.

also id. at 565 n.4 (majority opinion). Those concerns, which all members of this panel share, continue to trouble us. As a panel, however, we are of course bound faithfully to follow and apply the law of our circuit. We therefore conclude that the District Court was obliged to dismiss this suit under the doctrine of equitable discretion.

III

In the alternative, we hold that, even were *Melcher* not controlling, we are in accord with Judge Oberdorfer's view of the merits of appellants' challenge. In *Pressler v. Blumenthal*, 434 U.S. 1028 (1978), *aff'g Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), the Supreme Court summarily affirmed a decision of a three-judge district court, holding that the statutory mechanism for setting Congressional salaries in effect at the time did not violate the Ascertainment Clause. In that case, Congressman (now Senator) Larry Pressler brought suit challenging the method of setting Congressional pay established by the Federal Salary Act of 1967, Pub. L. 90-206, § 225, 81 Stat. 613, 642 (1967). The court held that, although the procedures established by the 1967 Act did not set salaries in the direct fashion that had historically obtained, *see supra* text at p. 3, the Ascertainment Clause was not to be read inflexibly so as to require Congress to establish specific figures in specific legislation. Rather, it sufficed that the procedures eventuating in the specific figures were set, *i.e.*, ascertained, by law.

In the course of its opinion, the three-judge court in *Pressler* observed that Congress had not delegated final responsibility for the setting of legislative salaries. To the contrary, Congress retained significant checks in the form of the appropriations process, the disapproval mechanism, and the ability at any time to enact superceding legislation. These checks, the court believed, were sufficient to vindicate the animating purpose of the Ascertain-

ment Clause—to affix political responsibility for the level of Members' pay ultimately with Congress itself.

On direct appeal, the decision of the three-judge court was summarily affirmed by the Supreme Court. *Pressler v. Blumenthal*, 434 U.S. 1028 (1978). The Court provided no reasons for its affirmance; nonetheless, under settled authority, its disposition has precedential—and binding—effect on the lower courts. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Thus matters stood until 1985. In that year, Congress amended the 1967 Act to correct perceived constitutional infirmities in the statutory structure flowing from the Supreme Court's holding in *INS v. Chadha*, 462 U.S. 919 (1983). *See* Pub. L. 99-190, § 135, 99 Stat. 1185, 1322 (1985).[5] *Chadha*, it scarcely bears repeating, condemned the theretofore frequently-enacted legislative veto device as violative of principles of separation of powers. Because the disapproval mechanism in the 1967 structure took the form of a legislative veto, Congress undertook to repair this fundamental defect. The 1985 Act thus amended the 1967 procedures for Congressional rejection of Presidential salary recommendations. Under the amended regime, legislative disapprobation must take the form of a joint resolution passed by both Houses and presented to the President for his signature. In all other material respects, the current Salary Act is the same as the one upheld against constitutional challenge in *Press-*

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[5] The Act had been amended in 1977 to require affirmative Congressional *approval* of the President's recommendation before they went into effect. *See* Pub. L. 95-19, § 401, 91 Stat. 39, 45 (1977). The 1985 amendments, in addition to curing the legislative veto problem, restored the structure for Congressional *disapproval* of Presidential recommendations as originally enacted in 1967. *See* Pub. L. 99-190, § 135(e), 99 Stat. 1185, 1322 (1985). The restoration of the 1967 structure (which was upheld in *Pressler*) is of course what gave rise to this lawsuit.

ler.[6] *Pressler* would thus indeed appear to be controlling, as Judge Oberdorfer concluded.

At the same time, however, the High Court has cautioned the inferior courts not to be too quick to ascribe binding force to summary dispositions. *See, e.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (noting that the binding effect of summary disposition is limited to the precise questions presented and resolved); *see also Hicks v. Miranda, supra*, 422 U.S. at 344. The Supreme Court's summary affirmance is thus controlling here only if the 1985 amendments to the Salary Act did not significantly alter the statute upheld in *Pressler*, or if the governing legal doctrines have not been modified significantly since that decision. *See id.*

On these questions, we are in full accord with the District Court. In our view, post-*Pressler* changes in the

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[6] An additional, minor distinction exists between the structure for setting Congressional salaries that was at issue in *Pressler* and the current mechanism. Until 1981, funds to pay Members' salaries were appropriated on an annual basis; thus, Congress could refuse to appropriate funds to pay its salaries, or for cost-of-living adjustments due Members and certain Executive Branch officials under the Executive Salary Cost-of-Living Adjustment Act, Pub. L. 94-82, § 204, 89 Stat. 419, 421 (1975). In 1981, however, Congress enacted a permanent appropriation to pay Members' salaries, which made it more difficult to employ the appropriations process to block salary increases. *See* Pub. L. 97-51, § 130(c), 95 Stat. 958, 966 (1981).

Appellants urge that this modest change in appropriations methodology significantly alters the constitutional status of the 1985 Act, in comparison with the framework upheld in *Pressler*. We disagree. Congress remains at liberty not to pay itself salaries to which it is entitled by law. The relative ease or difficulty of appropriating funds is not significant. Congress retains the power, notwithstanding the automatic appropriation process, to supplant that process with specific legislation at any time. *See United States v. Will*, 449 U.S. 200 (1980). The Article I branch thus continues to bear political responsibility for whatever appropriations actions it takes.

Salary Act have not altered in any significant fashion the system for setting Congressional salaries. In *Pressler*, as in the present case, the plaintiffs challenged the fundamental structure established by the Salary Act. The essential claim there, as here, was that Congress must affirmatively set its own salaries, and may not, in conformity with the Ascertainment Clause, delegate this responsibility to the President. The arguments employed in *Pressler* to attack the statutory structure were in the main the same ones we have before us today.[7] And, again, the three-judge court in *Pressler* rejected those arguments, observing that Congress retained ultimate power to set its pay through the already mentioned devices, such as rejection of the President's recommendations. In short, those devices, in varying degrees, remain efficaciously available to Congress.

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[7] Appellants urge that what they perceive as changes of late in the Supreme Court's treatment of separation-of-powers questions indicates that the Court would decide *Pressler* differently today. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 106 S. Ct. 3181 (1986). We cannot agree, even assuming, *arguendo*, that the Court's analysis of separation-of-powers questions has "changed." The reason is that appellants' Ascertainment Clause challenge, properly understood, does not implicate separation-of-powers concerns. The thrust of the Ascertainment Clause claim is that the Constitution requires Congress to set its own pay, and for its Members to take political responsibility for the amounts chosen. Appellants' claim would therefore be the same if the authority to set salaries were vested in a Committee of the Congress, or the Congressional leadership, or any other entity within the Article I branch rather than in another branch of government.

To be sure, appellants' argument that the Act embodies an unconstitutional delegation of legislative power falls within the domain of separation-of-powers concerns. But no recent doctrinal developments have undermined the Supreme Court's treatment of delegation questions, which has remained essentially unchanged since the constitutional triumph of the New Deal.

The basic structure specifically approved in *Pressler* thus remains in force today. Any post-*Chadha* tinkering with that structure has, in our view, been insignificant in relation to the overall scheme. Indeed, the only difference of any import is that Congress must now muster a majority of both Houses to reject the President's salary recommendations, instead of relying on a one-House legislative veto. But that difference, of course, represents the vindication of the constitutionally ordained process of enacting legislation. Unconstitutional shortcuts have been eliminated in conformity with *Chadha*'s teaching. The constitutionally prescribed remedy for appellants' grievances in this case—namely, action by the Congress in conformity with the procedures enunciated in Article I—remains the same. The marginally increased practical difficulty of following the course mandated by the Constitution provides no justification for declining to follow a Supreme Court holding so closely on point.[8]

A final argument remains. In appellants' view, because the Salary Act fails to delimit the President's action in his salary recommendations (save to the extent that he must deem them "advisable"), the Act represents an unconstitutional delegation of legislative power to the Executive. To the extent that similar arguments were not rejected in *Pressler*,[9] we reject them here. Only the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconsti-

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[8] We observe in this respect that, even if we did not deem ourselves bound by *Pressler* (by virtue of the factual differences featured by appellants), we would nonetheless view the Court's summary affirmance as singularly persuasive authority.

[9] *See Pressler*, 428 F.Supp. at 305 ("Plaintiff urges, in short, that Congress is required itself to fix its pay and that that responsibility in this regard cannot, in effect, be delegated or by-passed in the fashion provided by the Salary Act . . . .")

tutional. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). *Cf. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment). Recent delegations as broad (or broader) than the one at issue here have survived delegation doctrine attack. *See Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (three-judge court), *aff'd on other grounds*, 106 S. Ct. 3181 (1986); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court). But more fundamentally, it is not, upon reflection, a standardless delegation that we have before us. The Quadrennial Commission, *see supra* text at pp. 3-4, was established to provide guidance to the Chief Executive, and, as we have indicated at some length, Congress is afforded the opportunity explicitly to reject or modify any or all of the President's recommendations before they go into effect.[10] In our view, the Salary Act does not unconstitutionally delegate legislative power to the President.

* * * *

In sum, we hold that this circuit's doctrine of equitable discretion precludes the judiciary's hearing this case. In the alternative, we affirm the District Court's judgment on the merits.

Judgment accordingly.

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[10] This factor, we believe, distinguishes the present delegation from most other statutory delegations of power. Congress can, of course, virtually *always* simply change a statute if it is dissatisfied with the course followed by an agency to which it has delegated power. It could be argued, therefore, that Congress always retains rejection power similar to the power retained in the Salary Act. But peculiarly under the Salary Act, Congress must specifically be provided with the President's salary recommendations before they can have any force.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5310 **September Term, 1987**
D.C. Civil No. 87-0128

Gordon J. Humphrey, Senator, et al., Appellants

v.

James A. Baker, Secretary of the Treasury, et al.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED MAY 31 1988
CONSTANCE L. DUPRE
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Wald, Chief Judge, and Edwards and Starr, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby vacated and the case is remanded to the District Court with direction to dismiss the complaint, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, Clerk

Date: May 31, 1988
Opinion for the Court filed by Circuit Judge Starr

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR GORDON J. HUMPHREY, *et al.*, *Plaintiffs*,	
v.	Civil Action No. 87-0128-LFO
JAMES A. BAKER, III, *et al.*, *Defendants*,	FILED JUN 30, 1987 Clerk, U.S. District Court
and	
THE HONORABLE SPENCER M. WILLIAMS, *et al.*, *Intervenor-Defendants*.	

MEMORANDUM

I.

This action was brought by one Senator, five congressmen, an organization of taxpayers, and two individual taxpayers against several officers of the Legislative and Executive Bran-

ches to prevent them from disbursing to Senators, Congressmen, judicial officers and certain officials of the Executive Branch, salary increases purportedly authorized by the Federal Salary Act of 1967, 2 U.S.C. § 351 *et seq.*, as amended in 1985 by Pub. L. No. 99-160, 99 Stat. 1322 ("the Salary Act"). The matter is before the Court on cross-motions for summary judgment. The essential facts are not in dispute.

In essence the 1967 Act, as amended, authorizes the creation once every four years of a Commission, members of which are appointed variously by the President, the Chief Justice, the Speaker of the House and the President of the Senate for a term of one fiscal year. The Act requires the Commission to review the rates of pay of, among others, Senators, Congressmen, Justices and other federal judges, as well as high ranking officials of the Executive Branch. The Commission is supposed to submit to the President a report of the results of each review. The President, in turn, is required to:

> include, in the budget next transmitted . . . by him to the Congress after the date of the submission of the report and recommendations of the Commission . . . his recommendations with respect to the exact rates of pay which he *deems advisable* . . . .

2 U.S.C. § 358 (emphasis added). The recommendations of the President become effective and are to be printed in the Statutes at Large and the Federal Register unless during the 30-day period following the transmittal of these recommendations Congress enacts a joint resolution disapproving the recommendations or enacts a statute establishing rates other than those proposed by the recommendations.[1] 2 U.S.C. § § 359(1), 360.

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[1]2 U.S.C. § 360 provides that:

> The recommendations of the President . . . shall be held and considered to modify, supersede, or render inapplicable,

In 1985, Congress provided for the convening of a Supplementary Commission to examine salary levels.[2] Pub. L. No. 99-160, § 135(a), 99 Stat. 1185, 1322 (1985). On December 15, 1986, the Commission recommended to the President substantial pay increases for the officials who are the subject of the Act, including an increase in the pay of members of Congress from $77,400 to $135,000. *See* Commission on Executive, Legislative and Judicial Salaries, *High Quality Leadership— Our Government's Most Precious Asset* (1986). In the budget submitted to Congress on Monday, January 5, 1987, the President recommended increases that were below the Commission's recommendations, based on the need "to reduce the Federal deficit and hold the costs of government to an absolute minimum." Budget of the United States Government, 1988, *Recommendations for Executive, Legislative and Judicial Salaries* at 1. The President's recommendations included an increase in congressional pay to $89,500. *Id.* at 2.

The Senate agreed to a resolution disapproving all the President's recommended increases on January 29, 1987. The House approved this resolution on February 4, 1987. Statements made by members of both houses at the time of the House vote made clear that Congress believed that the House had disapproved the recommendations *after* the 30-day period provided for in the Salary Act. *See, e.g.*, 133 Cong. Rec. S1592 (daily ed. February 3, 1987) (remarks of Senator Humphrey); *id.* at H543 (daily ed. February 4, 1987) (remarks of Representative Ford). The President expressed the same view when

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as the case may be, to the extent inconsistent therewith —

(A) all provisions of law enacted prior to the effective date . . . of such recommendations (other than any provision of law enacted in the [30-day] period specified . . . .)

[2]Congress deemed this Supplementary Commission necessary because the 1985 quadrennial commission had focused solely on the procedures for adjusting salaries and had made no specific recommendations about appropriate salary levels.

he signed the joint resolution of disapproval into law on February 12, 1987, stating that "[t]he Attorney General has advised me that the purported disapproval of my pay recommendations is without any legal force and effect because the House of Representatives did not vote on the resolution until after expiration of the statutorily prescribed 30-day period for passage of a joint resolution of disapproval." 23 Weekly Comp. Pres. Doc. 148 (February 16, 1987). It is undisputed that the defendants in this action are currently calculating the pay of senior federal officials at the rates recommended by the President in his 1988 budget.

Plaintiffs contend that the current salary levels are unlawful because they were enacted pursuant to a statutory scheme that violates Article I, Section 6, Clause 1, the so-called Ascertainment Clause of the Constitution. That clause provides that:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. . . .

Plaintiffs urge that the Salary Act's delegation to the President of the authority to effect such changes in congressional salaries as he "deems advisable" is an impermissible transfer from Congress to the President of Congress' constitutional responsibility to fix congressional salaries by law. They point out that none of the delegations previously condoned by the appellate courts was so sweeping nor the standard so broad and subjective as that evidencing delegation to the President of the power to fix such salaries as he deems "advisable." For example, delegations cited by defendants to fix "fair and equitable prices," *Yakus v. United States*, 321 U.S. 414, 420, 425 (1944), set rates that are "just and reasonable," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944), regulate broadcasting consistently with the "public interest, conve-

nience, or necessity," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943), or determine prices that will give a "fair return on the fair value" of property, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940), are governed by relatively objective standards that use terms of art whose meaning could be illuminated by ample precedent defining those terms. There is no such "intelligible principle," *compare J.W. Hampton, Jr., Co. v. United States*, 276 U.S. 394, 409 (1928), to focus the decision of a President confined only to what he "deems advisable." *But see Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971) (three judge court) (upholding provision of Economic Stabilization Act of 1970 that granted authority to the President to "issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries"). Moreover, none of these precedents is governed by the special language and history of the Ascertainment Clause. That clause was drafted by persons manifestly familiar with the long and bloody struggle by which England's Parliament used its power of the purse (as well as the sword) to emancipate itself from domination of kings purporting to rule by Divine Right. *See, e.g.*, 8 Encyclopedia Britannica at 500-07 (1968). It is unlikely that the Founding Fathers would have proposed to leave to the President the absolute power to fix congressional (or for that matter) judicial salaries or would have authorized Congress by law to delegate such power to a President.

II.

Defendants respond, first, that neither the taxpayers nor the congressional plaintiffs have standing to sue.[3] The taxpayer

[3]The Senate defendant does not contest the standing of the congressional plaintiffs. *See* Memorandum of Points and Authorities in Support of Defendant Secretary of the Senate's Motion for Summary Judgment at 3 n.1.

plaintiffs concede that they lack standing, *see Richardson v. Kennedy*, 313 F. Supp. 1282 (W.D. Pa. 1970) (three judge court), *aff'd* 401 U.S. 901 (1971), so that if the matter is to be maintained it is on the claim of the congressional plaintiffs. The standing of these plaintiffs is established by *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976), *aff'd sub nom. Pressler v. Blumenthal*, 434 U.S. 1028 (1978). In *Pressler*, a three judge panel of this Court found that a Congressman who sought to challenge the constitutionality of the Salary Act and of the Executive Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, had alleged an injury sufficient to confer standing because "[w]hile salaries may be changed in the traditional fashion, the availability of procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious." 428 F. Supp. at 305. The *Pressler* decision was affirmed without opinion by the Supreme Court. 434 U.S. 1028 (1978). Justice Rehnquist noted in a concurring opinion that "[o]ur 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question." *Id.* at 1029. However, his opinion was not joined by any other Justice. Had the Court concluded that Congressman Pressler lacked standing, it would more likely have dismissed the appeal for want of federal jurisdiction. Defendants have suggested no persuasive basis for distinguishing the *Pressler* Court's recognition of the standing of plaintiff in that case. Defendants' contention that the congressional plaintiffs lack standing must therefore be rejected.[4]

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[4]More recent decisions in this Circuit have continued to recognize the standing of congressional plaintiffs who allege that they have been deprived of the opportunity "to participate and vote on legislation in a manner defined by the Constitution," *Moore v. U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), as

Defendants argue in the alternative that even if the congressional plaintiffs do have standing, this court should exercise "equitable discretion" and decline to hear their claims. The doctrine of "equitable discretion" was articulated for this Circuit in *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). In that case, a Senator sought to enjoin the Reserve Bank members of the Federal Open Market Committee from voting on the ground that the procedures for their selection violated the Appointments Clause. The Court of Appeals determined that the separation of powers considerations that are raised in cases where a plaintiff is a member of Congress should not be addressed in the context of standing. *See* 656 F.2d at 879-80. However, the court held that while these considerations should not be used to deny a legislator standing, they should be considered "through a doctrine of circumscribed equitable discretion" which would counsel dismissal of the complaint "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute." *Id.* at 881.

Nonetheless, the court was careful to limit this doctrine to cases where private plaintiffs are available:

> In short, our standing would counsel dismissal of congressional plaintiff actions only in cases in which (i) the plaintiff lacks standing under the traditional tests, or (ii) the plaintiff has standing but could get legislative redress and a similar action could be brought by a private plaintiff.

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long as the legislators ground their claim in a specific provision of the Constitution. *See id.*; *Synar v. United States*, 626 F. Supp. 1374, 1382 (D.D.C. 1986) (three judge court), *aff'd on other grounds sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *Melcher v. Federal Open Market Committee*, 644 F. Supp. 510, 513-14 (D.D.C. 1986). The plaintiffs claim here rests on Article I, Section 6, Clause 1.

Id. at 882. The court added that "[w]e would welcome congressional plaintiff actions involving non-frivolous claims of unconstitutional action which, because they could not be brought by a private plaintiff and are not subject to legislative redress, would go unreviewed unless brought by a legislative plaintiff." *Id.*

Defendant Baker suggests that the "no other plaintiff" exception is *Reigle* is no longer good law in this Circuit. He cites to the more recent decisions in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985); *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596, 600 (D.D.C. 1983), *aff'd* 770 F.2d 202 (D.C. Cir. 1985); *Crockett v. Reagan*, 558 F. Supp. 893, 902 (D.D.C. 1982), *aff'd* 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). It is true that the courts in these cases did not consider the availability of an alternative plaintiff in evaluating claims that it should exercise its equitable discretion. However, nothing in these opinions explicitly rejects the clear limitation on the doctrine of equitable discretion imposed by the *Riegle* court. It would be rash therefore to assume that limitation has been impliedly overruled. In the absence of a more explicit directive from the Supreme Court or the Court of Appeals, this Court should not exercise its "equitable disrection" in a manner that would effectively preclude judicial review of an important challenge to an Act of Congress. *See Melcher v. Federal Open Market Committee*, 644 F. Supp. 510, 517 (D.D.C. 1986).

III.

On the merits of plaintiffs' constitutional claims, defendants assert that the Salary Act is a law within the meaning of Arti-

cle I, Section 6, Clause 1, enactment of which discharged Congress' duty under that clause to see to it that salaries of Senators and Representatives are "ascertained by law." In any event, according to defendants, the 1976 decision in *Pressler* by the three judge District Court (summarily affirmed by the Supreme Court) established that the Salary Act does "fix congressional compensation by law," is "not prohibited by Article I, Section 6" and does not "contravene the Constitution." 428 F. Supp. at 306.

The *Pressler* court examined the legislative history of the Ascertainment Clause and concluded that "[t]he most these historical sources reflect is that the Founding Fathers felt that the Congress should have ultimate responsibility for determining by law what the compensation of its own members should be, as opposed to the suggestion that this final responsibility be delegated to others." *Id.* at 306. The Court concluded that the challenged delegation was not "absolute," *id.* at 305, and that Congress had retained the "ultimate responsibility" to set its own pay. *Id.* at 306.

Plaintiffs would distinguish *Pressler* because intervening developments have diminished Congress' ability to reject the salary levels recommended by the President. For example, at the time of the *Pressler* decision, one House of Congress could effectively disapprove a presidential recommendation. In response to the Supreme Court decision in *INS v. Chadha*, 462 U.S. 919 (1983), Congress amended the 1967 Act to require both Houses to enact a joint resolution and present it to the President in order effectively to disapprove his recommendations. Moreover, under the interpretation of the 30-day provision advanced by the defendants, any joint resolution must be signed by the President within the 30-day period after the recommendations are transmitted to Congress. If this interpretation of the Salary Act is correct, the brief 30-day period provided for congressional disapproval by the Act, as amend-

ed, leaves a President with the latent power virtually to vitiate Congress' disapproval prerogative. He can, for example, submit a budget containing a salary recommendation during a recess, and then veto a disapproval so that even if Congress succeeded in overriding the veto it could not, as a practical matter, do so within the 30-day "window" provided by the Act for congressional disapproval.

In addition, at the time of *Pressler*, Congress exercised ultimate control over the disbursement of any salary increase recommended by the President by use of its power to refuse to appropriate payments previously authorized. On several occasions, Congress prohibited the use of federal funds to pay for a cost of living increase which had been proposed by the President. *See, e.g.*, Pub. L. No. 94-440, 90 Stat. 1439, 1446 (1976). Since *Pressler*, Congress has provided that the funds necessary for "Compensation of Members" will be drawn from a special permanent appropriation not subject to annual vote. Pub. L. No. 97-51, § 130(c), 95 Stat. 966 (1981).

Nevertheless, the *Pressler* Court ruled that the Salary Act "explicitly reserved [to Congress] the right to enact legislation fixing congressional compensation from the President." 428 F. Supp. at 305. *See* 2 U.S.C. § 360. Amendments to the Salary Act legislation since *Pressler* was affirmed have not eliminated Congress' reserved power to fix congressional salaries. For example, 2 U.S.C. § 360 continues to recognize that the Congress may disapprove a Presidential recommendation by joint resolution during the 30-day period or supercede it by legislation enacted during or subsequent to that 30-day period. In addition, Congress retains, despite the automatic appropriation process, clear power to supercede that process with specific legislation. *See United States v. Will*, 449 U.S. 200, 225 (1980). The existence of the ultimate power to set aside or suspend a presidential recommendation preserves a

significant remnant of the factors which persuaded the *Pressler* Court that the delegation was not absolute.[5] This remnant precludes a meaningful distinction of *Pressler* and requires a summary judgment for defendants that the Salary Act, as amended, does not violate Article I, Section 6, Clause I of the Constitution.

Plaintiffs have also challenged the pay raises accorded to other senior federal officials on the ground that "Congress has consistently linked its own pay to that awarded to senior Executive and Judicial branch officials; it would not have enacted this statute at all had it not been for this linkage." *See* Memorandum of Plaintiffs in Support of Motion for Summary Judgment at 2 n.1. The Ascertainment Clause does not apply to Congress' authority with respect to executive and judicial salaries. Indeed, plaintiffs do not dispute that if Congress has authority under the Constitution to involve the President in fixing of compensation governed by the Ascertainment Clause, Congress also has authority to involve the President in determining executive compensation and in determining judicial compensation so long as it does not decrease the latter.[6] Since the Supreme Court's affirmance of *Pressler v. Simon* establishes the constitutionality of the process for fix-

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[5]Plaintiffs would also distinguish *Pressler* because the plaintiff in that case insisted that the Ascertainment Clause required Congress to fix the quantum of salary and did not pursue as a secondary issue whether, assuming the power to ascertain compensation was delegable, the delegation of power to fix salaries as the President "deems advisable" was a "rational" (i.e. not arbitrary or capricious) procedure "for fixing congressional compensation by means other than enacting a specific statute fixing each pay change." *Pressler*, 428 F. Supp. at 305-06. However, this distinction does not overcome for plaintiffs the obstacle posed for them by the *Pressler* rationale: the Congress has reserved a power to set aside the President's recommendation so that the President's power is not impermissibly "absolute."

[6]Article III proscribes reduction of judicial salaries. *United States v. Will*, *supra*.

ing congressional salaries, the authority to fix executive and increase judicial salaries necessarily follows.

IV.

Although plaintiffs' original challenge was to the constitutionality of the Salary Act as amended, their amended complaint alleges that even if the Act is valid, the President's recent recommendation of increases for Congressmen, judges, and key executive officials was effectively disapproved by enactment of a joint resolution within 30 days after the President transmitted the budget containing his salary increase recommendations. Plaintiffs' statutory claim turns on the provision of 2 U.S.C. § 359(1) which requires Congress to enact any joint resolution of disapproval "not later than the last day of the 30-day period which begins on the date of which such recommendations are transmitted to the Congress." It is plaintiffs' theory that when, on January 5, 1987, the President transmitted the budget containing the recommendation to the Office of the Speaker of the House and the Office of the President of the Senate, Congress was not in session. According to plaintiffs' statement of material facts, the 100th Congress did not convene until January 6, 1987. *See* Plaintiffs' Statement of Material Facts as to Which There is No Genuine Dispute at 3-4. Therefore, it is argued, the President's recommendations could not be "transmitted" to Congress until that date. Plaintiffs also argue that transmittal to the House was ineffective on the 5th because Representative James Wright was not elected the new Speaker of the House until the 6th. Thus, according to plaintiffs, when the House voted to disapprove the recommendations on February 4, 1987, the vote fell within the 30 day period. February 4 is not within the 30-day period which began on January 5, but is within the 30-day period which began on January 6.

Whether the House action on February 4 effectively disapproved the recommendations turns on whether transmittal of the recommendations was complete upon delivery of them to the Office of the Speaker of the House and the Office of the President of the Senate on January 5 before the 100th Congress convened and before there was a speaker. The statutory scheme hitches the transmittal of the salary recommendations to the transmittal of the President's budget. The President is required by law to submit a budget "on or before the first Monday after January 3 each year." 31 U.S.C. § 1105(a). In 1987, that was January 5. If a new Congress can effectively receive a budget before the Congress formerly convenes, it can effectively receive a salary recommendation. Moreover, in the absence of some clearer directive, transmittal to the House of Representatives and to the Senate can be effected by delivery to the Office of the Speaker of the House and to the Office of the President of the Senate. *Compare Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 629 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 950 (1965) (". . . delivery to the White House is effective presentation to the President"). It is arguable that, unlike the President in the *Eber* case, the House of Representatives had not convened for the 100th Congress so that even if delivery to an agent of Congress could effect transmittal, there could be no viable agent for the House because, until it convened, its agent would have no principal. However, this argument is foreclosed by the Twentieth Amendment to the Constitution as interpreted by our Court of Appeals. The Amendment provides that:

> the terms of Senators and Representatives [shall end] at noon on the 3d day of January . . . [of odd-numbered years] and the terms of their successors shall then begin.

Thus, the Court of Appeals for this Circuit has stated its "understanding under the Twentieth Amendment that the

houses of each Congress constitutionally exist from January 3 of each odd-numbered year through January 3 of the next odd-numbered year, regardless whether the houses are sitting or in adjournment. Thus, even when the houses are not in session, they can exchange messages and have bills enrolled, signed, and presented to the President." *Barnes v. Kline*, 759 F.2d 21, 37 n.29 (D.C. Cir. 1985), *vacated sub nom. Burke v. Barnes*, 107 S. Ct. 734 (1987). This authority forecloses plaintiffs' claim that the January 5 delivery to the Office of the Speaker was an ineffective transmittal of the President's recommendations. Thus, plaintiffs fail to establish that the informed judgments of the President and the Congress as to the effective date of transmittal were erroneous. The transmittal was effective on January 5 so that the February 4 action of the House joining the Senate's disapproval resolution and the February 12 action of the President signing the disapproval resolution occurred more than 30 days after the transmittal. Neither effectively disapproved of the President's recommendations. Unless and until the President makes another effective recommendation or the Congress enacts, and the President signs, some other legislation determining salaries, those put in place by the President's January 5, 1987 recommendations are valid and effective. An accompanying order will deny plaintiffs' motion for summary judgment and grant summary to the defendants.

/s/ Louis D. Oberdorfer
UNITED STATES DISTRICT JUDGE

Date: June 30, 1987

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[7]This determination eliminates the need to consider whether any joint resolution of disapproval must also be signed by the President within the 30-day period in order to be effective.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR GORDON J. HUMPHREY, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 87-0128-LFO
JAMES A. BAKER, III, *et al.*,	)	FILED JUN 30 1987
Defendants,	)	
and	)	
THE HONORABLE SPENCER M. WILLIAMS, *et al*, Intervenor-Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum, it is this *30th* day of June, 1987, hereby

ORDERED: that plaintiffs' motion for summary judgment should be, and is hereby, DENIED; and it is further

ORDERED: that the motions of defendants and intervenor-defendants for summary judgment should be, and are hereby, GRANTED; and it is further

ORDERED: that this Complaint is hereby DISMISSED

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX D

FEDERAL SALARY ACT OF 1967, AS AMENDED

§ 351. Establishment of Commission

There is hereby established a commission to be known as the Commission on Executive, Legislative, and Judicial Salaries (hereinafter referred to as the "Commission").

§ 352. Membership of Commission; appointment; Chairman; term of office; vacancies; compensation; expenses; allowances

(1) The Commission shall be composed of nine members who shall be appointed from private life, as follows:

(A) three appointed by the President of the United States one of whom shall be designated as Chairman by the President;

(B) two appointed by the President of the Senate;

(C) two appointed by the Speaker of the House of Representatives; and

(D) two appointed by the Chief Justice of the United States.

(2) The terms of office of persons first appointed as members of the Commission shall be for the period of the 1969 fiscal year of the Federal Government, except that, if any appointment to membership on the Commission is made after the beginning and before the close of such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year.

(3) After the close of the 1969 fiscal year of the Federal Government, persons shall be appointed as members of the Commission with respect to every fourth fiscal year following

the 1969 fiscal year. The terms of office of persons so appointed shall be for the period of the fiscal year with respect to which the appointment is made, except that, if any appointment is made after the beginning and before the close of any such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year and with respect to fiscal year 1987.

(4) A vacancy in the membership of the Commission shall be filled in the manner in which the original appointment was made.

(5) Each member of the Commission shall be paid at the rate of $100 for each day such member is engaged upon the work of the Commission and shall be allowed travel expenses, including a per diem allowance, in accordance with section 5703(b) of Title 5, when engaged in the performance of services for the Commission.

* * *

§ 356. Functions of Commission

The Commission shall conduct, in each of the respective fiscal years referred to in section 352(2) and (3) of this title, a review of the rates of pay of-

(A) the Vice President of the United States, Senators, Members of the House of Representatives, the Resident Commissioner from Puerto Rico, the Speaker of the House of Representatives, the President pro tempore of the Senate, and the majority and minority leaders of the Senate and the House of Representatives;

(B) offices and positions in the legislative branch referred to in subsections (a), (b), (c), and (d) of section 203 of the Federal Legislative Salary Act of 1964 (78 Stat. 515; Public Law 88-426);

(C) justices, judges, and other personnel in the judicial branch referred to in section 403 of the Federal Judicial Salary Act of 1964 (78 Stat. 434; Public Law 88-426) and magistrates and the judges of the United States Claims Court;

(D) offices and positions under the Executive Schedule in subchapter II of chapter 53 of Title 5; and

(E) the Governors of the Board of Governors of the United States Postal Service under section 202 of Title 39.

Such review by the Commission shall be made for the purposes of determining and providing-

(i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and

(ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and General Schedule pay rates.

In reviewing the rates of pay of the offices or positions referred to in subparagraph (D) of this subsection, the Commission shall determine and consider the appropriateness of the executive levels of such offices and positions.

§ 357. Report to the President

The Commission shall submit to the President a report of the results of each review conducted by the Commission of the offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title, together with its recommendations. Each such report shall be submitted on such date as the President may designate but not later than December 15 of the fiscal year in which the review is conducted by the Commission.

§ 358. Recommendations of the President to Congress

The President shall include, in the budget next transmitted under section 1105(a) of Title 31, by him to the Congress after the date of the submission of the report and recommendations of the Commission under section 357 of this title, his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title.

§ 359. Effective date of Presidential recommendations

(1) The recommendations of the President which are transmitted to the Congress pursuant to section 358 of this title shall be effective as provided in paragraph (2) of this subsection unless any such recommendation is disapproved by a joint resolution agreed to by the Congress not later than the last day of the 30-day period which begins on the date of [sic] which such recommendations are transmitted to the Congress.

(2) The effective date of the rate or rates of pay which take effect for an office or position under paragraph (1) of this subsection shall be the first day of the first pay period which begins for such office or position after the end of the 30-day period described in such paragraph.

§ 360. Effect of Presidential recommendations on existing law and prior recommendations

The recommendations of the President taking effect as provided in section 359 of this title shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent with

(A) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of such recom-

mendations (other than any provision of law enacted in the period specified [in] section 359 of this title with respect to such recommendations), and

(B) any prior recommendations of the President which effect under this chapter.

1985 Amendments
Pub. L. 99-190, 99 Stat. 1322
[included above, but reprinted separately]

Sec. 135 . . .

Sec. 135.(a) The first sentence of section 225(b) of the Federal Salary Act of 1967 (2 U.S.C. 352(3)) is amended by inserting "and with respect to fiscal year 1987" before the period at the end thereof.

(b) Section 225(f) of such Act (2 U.S.C. 356) is amended by adding at the end thereof the following flush sentence: "In reviewing the rates of pay of the offices or positions referred to in subparagraph (D) of this subsection, the Commission shall determine and consider the appropriatness of the executive levels of such offices and positions."

(c) The second sentence of section 225(g) of such Act (2 U.S.C. 357) is amended by striking out "January 1 next following the close" and inserting in lieu "December 15".

(d) Section 225(h) of such Act (2 U.S.C. 358) is amended

(1) by inserting "under section 1105(a) of title 31, United States Code," in the first sentence after "transmitted"; and

(2) by striking out the second sentence.

(e) Section 225(i) of such Act (2 U.S.C. 359) is amended by striking out paragraphs (1) and (2) and inserting in lieu thereof the following

"(i) EFFECTIVE DATE OF RECOMMENDATIONS OF THE PRESIDENT-

"(1) The recommendations of the President which are transmitted to the Congress pursuant to subsection (h) of this section shall be effective as provided in paragraph (2) of this subsection unless any such recommendation is disapproved by a joint resolution agreed to by the Congress not later than th last day of the 30-day period which begins on the date of [sic] which such recommendations are transmitted to the Congress.

"(2) The effective date of the rate or rates of pay which take effect for an office or position under paragraph (1) of this subsection shall be the first day of the first pay period which begins for such office or position after the end of the 30-day period described in such paragraph.".

(f) Section 225(j) of such Act (2 U.S.C. 360) is amended—

(1) by striking out "transmitted to the Congress immediately following a review conducted by the Commission in one of the fiscal years referred to in subsection (b)(2) or (3) of this section shall, if approved by the Congress as provided in subparagraph (i)," and inserting in lieu thereof "taking effect as provided in subsection (i) of this section shall"; and

(2) in clause (A), by striking out "in paragraph (1) of".

(g) Notwithstanding section 225(g) of such Act (2 U.S.C. 357), the Commission on Executive, Legislative, and Judicial Salaries shall not make recommendations on the rates of pay of offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 225(f) of such Act (2 U.S.C. 356) in connection with the review of rates of pay of such offices and positions conducted by the Commission in fiscal year 1985.

Supreme Court, U.S.
FILED
OCT 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-352 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

GORDON J. HUMPHREY, ET AL., PETITIONERS,

v.

NICHOLAS BRADY, SECRETARY OF THE TREASURY, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF THE HONORABLE JACK RUSS, SERGEANT-AT-ARMS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OCTOBER 1988.

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-352

GORDON J. HUMPHREY, ET AL., PETITIONERS,

v.

NICHOLAS BRADY, SECRETARY OF THE TREASURY, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Honorable Jack Russ, Sergeant-At-Arms of the United States House of Representatives, is responsible for the disbursement of the salaries of Members of the House. See 31 U.S.C. § 148. In that capacity, he was named as a defendant by Plaintiff-Petitioners. The House Sergeant-At-Arms joins with the other defendants in opposing the grant of certiorari.

In general, the House Sergeant-At-Arms agrees with and joins in the arguments presented by the Secretary of the Treasury. Like the Secretary, the House respondent believes that both the district court and the court of appeals were correct in recognizing that the Federal Salary Act of 1967, as amended, is constitutional and that this case is controlled by this Court's summary affirmance in *Pressler* v. *Simon*, 428 F. Supp. 302 (D.D.C. 1976), (Three-judge court), *vacated and remanded*, 431 U.S. 169 (1977),

opinion reinstated, (D.D.C. July 19, 1977) (Three-Judge Court), *aff'd sub nom., Pressler* v. *Blumenthal,* 434 U.S. 1028 (1978).

Like the Secretary, the House respondent believes that the court of appeals correctly relied upon its decision in *Melcher* v. *Federal Open Market Committee,* 836 F. 2d 561 (D.C. Cir 1987), *cert. denied,* No. 87-1546 (1988), to find that Plaintiffs had not presented a justiciable case. While there are certain interbranch disputes for which the House Respondent believes that judicial resolution must be available, this dispute, which is essentially intra-branch, is not among them.

CONCLUSION

The petition for a writ of certiorari should be denied.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT MEMORANDUM IN OPPOSITION OF RESPONDENTS THE SECRETARY OF THE SENATE, WALTER J. STEWART, AND UNITED STATES DISTRICT JUDGE SPENCER M. WILLIAMS, ET AL.

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OCTOBER 1988.

In the Supreme Court of the United States

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The Secretary of the Senate, who is the disbursing officer of the Senate, and eleven district and circuit judges, who intervened to defend the constitutionality of the Federal Salary Act of 1967, as amended, join in the opposition of the Secretary of the Treasury to the petition for a writ of certiorari.

1. The Senate and Judicial Branch respondents adopt the Secretary of the Treasury's arguments that (i) the judgment of the court of appeals in favor of the Salary Act's constitutionality was required by this Court's summary affirmance in *Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978); (ii) the Salary Act accords with the historical purposes and textual constraints of the Ascertainment

Clause; and (iii) the Salary Act's delegation to the President is properly channeled by the mechanisms established in the Act, the understanding of the law and its legislative intent manifested by the Commissions and Presidents who have implemented it over the past twenty years, and the policies enacted by Congress in the network of interrelated compensation statutes of which the Salary Act is a part.

2. While neither the Senate nor the Judicial Branch respondents took a position below on justiciability, it is clear that petitioners' justiciability question presents a theoretical dispute that is unlikely to affect the outcome of the case because the merits provide independently sufficient grounds for the dismissal of the complaint. Accordingly, the Senate and Judicial Branch respondents agree with the Secretary of the Treasury that review in this Court of the justiciability of the complaint is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

1. Whether the Salary Act of 1967, 2 U.S.C. (& Supp. IV) 351 *et seq.*, under which the President's recommendations as to the salaries to be paid to members of Congress, judges, and high executive officials become effective if not disapproved within 30 days by means of a joint resolution of Congress, provides compensation to members of Congress that is "ascertained by Law" within the meaning of the Ascertainment Clause, Art. I, § 6, of the Constitution.

2. Whether the Salary Act of 1967 is an unconstitutionally broad delegation of power to establish judicial, executive and congressional compensation.

3. Whether individual members of Congress, taxpayers or an organization of taxpayers have standing to challenge the Salary Act on either of these grounds.

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In the Supreme Court of the United States

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SENATOR GORDON J. HUMPHREY, ET AL., PETITIONERS

v.

NICHOLAS F. BRADY, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 848 F.2d 211. The opinion of the district court (Pet. App. 15a-28a) is reported at 665 F. Supp. 23.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1988. The petition for a writ of certiorari was filed on August 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] Pursuant to Supreme Court Rule 40.3, the current Secretary of the Treasury, Nicholas F. Brady, should be substituted as the first named respondent in the caption of this case.

STATEMENT

1. The Federal Salary Act of 1967, 2 U.S.C. (& Supp. IV) 351 *et seq.* [hereinafter the Salary Act], provides for the creation, at four-year intervals, of a Quadrennial Commission to conduct a review of salaries paid to the Vice President, members of Congress, Article III judges, high-level officials in the Executive Branch, and certain others. The members of the Commission are appointed by the President, the Chief Justice, the Speaker of the House, and the President of the Senate (2 U.S.C. (& Supp. IV) 352). The Quadrennial Commission is charged with examining the rates of pay for the positions covered by the Act for the purposes of recommending (i) the appropriate pay levels for these positions and the relationships between them and (ii) the appropriate pay relationships between those positions and the GS pay scales (2 U.S.C. (& Supp. IV) 356). A report of the results of this review, together with the Commission's recommendations, is then submitted to the President (2 U.S.C. (& Supp. IV) 357).

The Act requires the President, after he has received the Commission's report, to submit to Congress in his next budget "his recommendations with respect to the exact rates of pay which he deems advisable" for the covered positions (2 U.S.C. (& Supp. IV) 358). As originally enacted, the Salary Act provided that the President's recommendations would go into effect unless, within 30 days, Congress passed a contrary statute, or either House of Congress passed legislation disapproving them. Postal Revenue and Salary Act of 1967, Pub. L. No. 90-206, § 225(i), 81 Stat. 644. In 1977, the Act was amended so that the President's recommendations would become effective only if approved within 60 days by both Houses through roll call votes. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § 401, 91 Stat. 45. Finally, in 1985, after this Court held

the legislative veto mechanism invalid in *INS* v. *Chadha*, 462 U.S. 919 (1983), Congress further amended the Salary Act to provide that the President's pay recommendations would become effective unless, within 30 days of his report, Congress disapproved any such recommendation by means of a joint resolution. Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, § 135(e), 99 Stat. 1322.

2. In 1985, Congress also provided for a one-time supplementary Commission whose report was to be prepared in the following year (Pet. App. 17a). On December 15, 1986, this Commission provided the President with a report that recommended substantial pay increases for officials covered by the Act (*ibid.*) When the President submitted his budget to Congress on January 5, 1987, he recommended smaller salary increases for these officials, citing the need "to reduce the Federal deficit and hold the costs of government to an absolute minimum" (*ibid.*).[2]

The Senate passed a resolution disapproving the President's recommendations on January 29, 1987, and the House of Representatives passed an identical resolution on February 4. Statements by some members of both Houses expressed the position that the House resolution was untimely (Pet. App. 17a). The President signed the joint resolution, which also provided for other matters such as aid for the homeless, but noted that, on the advice of the Justice Department, he considered the portion of the resolution relating to compensation to be without any legal effect (*id.* at 18a). The officials covered by the Salary

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[2] For instance, the supplementary Commission's report recommended that the salary paid to members of Congress be increased to $135,000. The President recommended a salary of $89,500 for legislators, with higher levels for the Speaker of the House, President Pro Tempore of the Senate, and the majority and minority leaders of both Houses. 52 Fed. Reg. 4125 (1987).

Act received the increases recommended by the President in accordance with the Act.

3. Petitioners are a United States Senator and five Members of the House of Representatives (hereinafter collectively the "congressional petitioners"), as well as two individual taxpayers and an association of taxpayers (hereinafter collectively the "taxpayer petitioners"). They filed this action in the United States District Court for the District of Columbia against the Secretary of the Treasury, the Secretary of the Senate, and the Sergeant-at-Arms of the House of Representatives—the officials who are responsible for disbursing salaries to Executive Branch officials, judges, and Members of Congress pursuant to the Act (Pet. App. 15a-16a). In April 1987, a group of federal judges intervened as defendants.

An amended complaint alleged that the Salary Act has injured the congressional petitioners by (1) preventing them from exercising their legislative duty of setting their own salary, (2) diluting and diminishing their legislative powers, and (3) harming their reputation in the eyes of constituents who might hold them responsible for pay raises under the Act (Amended Compl. para. 9). It also alleged that the pay increases granted under the Act, and their alleged tendency to increase salaries paid to other officials, would impose an economic burden on taxpayers (*id.* para. 10). This injury to taxpayers, the complaint continued (*ibid.*), resulted from an exercise of legislative power under the Taxing and Spending Clause (Art. I, § 8, Cl. 1) that was allegedly in violation of the Ascertainment Clause (Art. I, § 6). On the merits, the complaint alleged that the Salary Act was an unlawful and excessive delegation of legislative power, that this delegation violated the Ascertainment Clause and the principle of separation of powers, and that Congress had timely disapproved the

President's salary recommendations in 1987 (Amended Compl. paras. 11-13).

4. On June 30, 1987, the district court granted summary judgment to respondents. The court first held (Pet. App. 20a) that the congressional petitioners' standing to bring this action was established by this Court's summary affirmance in *Pressler* v. *Simon,* 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), aff'd mem., 434 U.S. 1028 (1978), a case raising substantially the same issues as this one.[3] The district court also refused to dismiss the suit on the basis of the D.C. Circuit's "equitable discretion" doctrine, under which that court declines to hear actions brought by members of Congress for which they have an "in-house" remedy in the form of corrective legislation. Relying on dicta in *Riegle* v. *Federal Open Market Comm.,* 656 F.2d 873, 882 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981), the district court held that this doctrine requires dismissal only in cases in which a private plaintiff would be able to litigate claims that members of Congress were precluded from pursuing (Pet. App. 21a-22a).

On the merits, the district court held that *Pressler* v. *Simon, supra,* compelled the conclusion that the Salary Act does not violate the Ascertainment Clause. The court noted that petitioners had offered a number of distinctions between the statutory scheme that had been upheld in *Pressler* and the current Act, which had been amended to comply with *Chadha.* Nevertheless, the court reasoned that "the ultimate power to set aside or suspend a presidential recommendation," which Congress retains under

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[3] In the district court and the court of appeals, the taxpayer petitioners acknowledged that *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa. 1970) (three-judge court), aff'd, 401 U.S. 901 (1971), compelled a ruling that they lacked standing (Pet. App. 20a). Petitioners reserved the option, however, of revisiting that issue in this Court.

the present statute, "precludes a meaningful distinction of *Pressler*" (Pet. App. 24a-25a). Finally, the district court held that Congress's resolution purporting to disapprove the President's 1987 recommendations had not been passed within the 30-day period established by the Salary Act and was therefore without legal effect (*id.* at 26a-28a).

5. On appeal, the court of appeals held that the D.C. Circuit's "equitable discretion" doctrine required dismissal of the case and, in the alternative, affirmed the district court's ruling on the merits (Pet. App. 1a-13a).[4]

a. The court relied on *Melcher* v. *Federal Open Market Comm.*, 836 F.2d 561 (D.C. Cir. 1987), cert. denied, No. 87-1546 (June 6, 1988), in holding that it would be an abuse of discretion to allow the congressional petitioners to maintain this action (Pet. App. 6a). The court explained that *Melcher* had made clear that it was immaterial whether private parties would be able to litigate claims that the "equitable discretion" doctrine prevented members of Congress from pursuing (Pet. App. 6a & n.4). The congressional petitioners, it found, had "readily at hand * * * an 'in-house' remedy" for their alleged injuries in the form of passage of legislation amending the Salary Act (*id.* at 6a). While it expressed some concern with the "equitable discretion" doctrine (*id.* at 7a-8a), the court concluded that the law of the circuit required dismissal (*id.* at 8a).[5]

b. In the alternative, the court of appeals affirmed the district court's decision on the merits. This Court's summary affirmance in *Pressler* v. *Simon, supra,* was control-

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[4] Petitioners abandoned on appeal their argument that the disapproval resolution had been timely.

[5] The panel did specifically note, however, that it was not questioning the congressional petitioners' standing or the action's justiciability (*id.* at 7a n.4).

ling, the court of appeals explained, unless the 1985 amendments to the Salary Act had significantly altered the statute upheld in *Pressler* or the governing legal doctrines had been significantly modified (Pet. App. 10a). The court found that the "post-*Pressler* changes in the Salary Act have not altered in any significant fashion the system for setting Congressional salaries" (*id.* at 10a-11a). More specifically, the court concluded that the devices by which Congress can exercise "ultimate power to set its pay * * * remain efficaciously available" (*ibid.*), that "any post-*Chadha* tinkering" with the basic structure approved in *Pressler* has been "insignificant in relation to the overall scheme" (*id.* at 12a), and that the "marginally increased * * * difficulty" involved in disapproving a President's recommendations by joint resolution instead of a one-House veto "provides no justification for declining to follow a Supreme Court holding so closely on point" (*ibid.*). The court also rejected the suggestion that this Court's decisions in *Chadha* and *Bowsher* v. *Synar*, 478 U.S. 714 (1986), indicated that the Court would now decide *Pressler* differently (Pet. App. 11a n.7).

Finally, the D.C. Circuit rejected petitioners' argument that the Salary Act represented an unconstitutional delegation of legislative power. After construing this Court's cases as condemning "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion" (Pet. App. 12a), the court of appeals noted that "[r]ecent delegations as broad (or broader) than" the Salary Act had "survived delegation doctrine attack" (*id.* at 13a). More fundamentally, however, the court found that the Salary Act is not "a standardless delegation," since the President acts with the guidance of the Quadrennial Commission and the statute reserves to Congress the opportunity to reject or modify

the President's recommendations before they go into effect (*id.* at 13a & n. 10).

ARGUMENT

As both the district court and the court of appeals held, this case is controlled by this Court's summary affirmance in *Pressler* v. *Simon, supra.* The distinctions that petitioners draw between the statute that was sustained in that case and the current Act have no constitutional significance, and there is no other reason to reconsider the result in *Pressler.* The court of appeals' disposition of petitioners' excessive delegation claim does not conflict with the standards set forth in this Court's cases or with any decision of another court of appeals. Finally, whether described in terms of standing or the D.C. Circuit's "equitable discretion" doctrine, the inappropriateness of petitioners' claims for judicial resolution is manifest and independently justifies denial of further review.

1. Since the Salary Act's enactment in 1967, the basic salaries paid to members of Congress have been established through a three-step process. First, the Commission reviews the salaries paid to persons covered by the Act, the pay relationships among them, and the relationships between these positions and the GS schedule and provides its findings and recommendations to the President; next, the President forwards his recommendations to Congress; and, finally, the President's recommendations are subject to congressional approval or disapproval. Only the last step in the process has changed. Under the first version of the Act, in effect before the 1977 amendment, the President's recommendations became law unless either House disapproved them within 30 days of their transmittal to Congress or the Congress passed legislation superseding them. Under the second version of the Act, in effect after

the 1977 amendment, the President's recommendations became effective when and if they were approved by a vote of each House. Finally, under the 1985 amendment, the President's recommendation becomes effective unless disapproved in a joint resolution that is subject to signature by the President.

In 1976, in *Pressler*, a three-judge court held that the first version of the Act did not violate the Ascertainment Clause (428 F. Supp. 302). It explained that under this scheme congressional salaries were "ascertained by law" as required by the Ascertainment Clause (428 F. Supp. at 305), and that neither the history nor the presumed purposes of the Clause suggested that it was designed "to prevent the Congress from developing rational procedures of this type for fixing congressional compensation by means other than enacting a specific statute fixing each pay change" (*id.* at 305-306). After an appeal had been taken to this Court, the 1977 amendment was passed, and this Court vacated and remanded "for further consideration in the light of the new legislation" (*Pressler* v. *Blumenthal,* 431 U.S. 169, 170 (1977)). Observing that the new legislation would not become effective until 1980 or 1981 and thus did not affect Pressler's claims, the three-judge court reinstated its prior decision. This Court summarily affirmed (434 U.S. 1028 (1978)). In a brief concurring opinion, then-Justice Rehnquist stated that "this 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question."

Both lower courts were fully justified in concluding that the *Pressler* decision is also dispositive of petitioners' challenge to the current version of the Act. *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975). The reasoning of the three-judge court's opinion applies with equal force to the

present statute, since Congress has retained the "ultimate power to set its pay" (Pet. App. 11a). The various features of the current Act that petitioners stress—the need for action of both Houses and signature by the President, Congress's decision to do away with annual appropriations for its compensation, and the time period within which Congress must act (Pet. 13-14)—go only to the "practical difficulty" (Pet. App. 12a) of exercising that power, not to its existence.

More broadly, the issue that *Pressler* decided is no more deserving of plenary review now than it was then. On its face, the language of the Ascertainment Clause requires only that Members of Congress "receive a Compensation for their Services," that this compensation be "ascertained by Law," and that it be "paid out of the Treasury of the United States." The Salary Act fully complies with each of these requirements. Specifically, with respect to the point in dispute here, congressional salaries are "ascertained" by a "Law," the Salary Act. The additional requirements for which petitioners argue—*i.e.*, that salaries can be "ascertained" only by a "Law" that sets dollar amounts or relies on calculations like cost-of-living increases which petitioners would characterize as "objectively determinable" (Pet. 12)—cannot be found in the language of the Clause.[6]

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[6] The history of the Ascertainment Clause is also inconsistent with petitioners' attempt to make it a prohibition on the delegation of any part of Congress's power to establish its compensation. There is no hint in the records of the debates accompanying the adoption of this provision at the Constitutional Convention that the Framers conceived of it as such. Rather, the discussions in this area took place on a far more fundamental level. The principal issue at the Convention was whether the States or the federal government would pay members of Congress. 1 W. Benton, *1787: Drafting the U.S. Constitution*, at 686, 689-692, 692-694, 696-698, 700-702 (1986). There was also consideration of whether members of one or both Houses would be paid at all

Nor does this conclusion threaten any principle of accountability that the Ascertainment Clause might be said to express. It is clear in the Salary Act that the "ultimate authority" over, and thus responsibility for, Congress's compensation remains with Congress. Individual members are free to express their positions by voting on a resolution of disapproval within the framework of the Act, or by supporting legislation setting different salaries for themselves. There is nothing to prevent Congress from repealing the Act. Finally, petitioners' complaint alleges that some of their constituents hold them responsible for Congress's pay raise (see page 4, *supra*), an indication that the public understands who is accountable for the results of this legislation.

2. Petitioners assert that the terms of the Act's delegation to the President "are more open-ended" than other statutes that this Court has upheld (Pet. 15) and suggest that this case therefore presents the question whether the excessive delegation doctrine must "be interred" (Pet. 16). However, the power delegated to the President under the Salary Act to fix legislative, judicial, and executive compensation, properly understood and viewed in its context, is sufficiently limited. The court of appeals' holding to this effect does not go beyond this Court's cases in this area.

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and whether Congress could be trusted with fixing its own pay, as opposed to having it fixed in the Constitution itself. *Id.* at 686, 687, 689-691, 693, 696, 698, 703. The three phrases in the Ascertainment Clause correspond to these three very basic issues. In terms of the language of the clause, the Framers decided that members of Congress were to be paid for their service, "receive a Compensation", rather than working for free; that their compensation was to be fixed by legislation, "ascertained by Law," rather than by the Constitution; and that the money was to come from the federal government, "out of the Treasury of the United States," rather than from the States.

The core issue, when a statute is challenged as an excessive delegation, is whether it contains an "intelligible principle" guiding executive action (*J.W. Hampton, Jr. & Co.* v. *United States,* 276 U.S. 394, 409 (1928)). Only if it could be said "that there is an absence of standards for the guidance of" executive action, "so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would [a court] be justified in overriding its choice of means for effecting its declared purpose." *Yakus* v. *United States,* 321 U.S. 414, 426 (1944). The language defining the President's function under the Salary Act, which is to recommend "the exact rates of pay which he deems advisable" (2 U.S.C. (& Supp. IV) 358) after receiving the Quadrennial Commission's report, fully satisfies these standards and is comparable to other formulations that this Court has upheld. *E.g., Yakus,* 321 U.S. at 420, 427 (approving statute which delegated to price administrator the power to promulgate regulations fixing prices which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act"); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398 (1940) (quoting similar statutes); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 214-215, 225 (1943) (upholding delegation of power to license radio communications and promulgate regulations in accordance with the "public convenience, interest, or necessity"); *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591, 600 (1944) (statute authorizing agency to fix "just and reasonable" rates for natural gas).[7]

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[7] In *AFGE* v. *Reagan,* 806 F.2d 1034, 1038 (Fed. Cir. 1986), cert. denied, No. 86-1349 (May 26, 1987), the court upheld Congress's similar delegation of authority under the Federal Pay Comparability Act of 1970. In issue in that case was the constitutionality of a provision (5 U.S.C. 5305(c)(1)) which authorizes the President to submit pay schedules in the form of an "alternative plan" which "he considers

Moreover, petitioners' exclusive focus on the language of the Salary Act ignores the significant limitations within which the President must operate. His recommendations are made only once every four years, and must be included in the budget submitted to Congress immediately after his receipt of the Quadrennial Commission's report. The recommendations can take only one form—"the exact rates of pay" for persons within the Act's coverage. Finally, as the court of appeals emphasized, the recommendations are not immediately effective (Pet. App. 13a & n.10). The relatively limited nature of the power exercised by the President under this scheme contrasts markedly with the authority of executive officials under a host of other statutes to design and modify wide-ranging regulatory programs on an ongoing basis. These features of the Salary Act also distinguish this case from the parade of horribles that petitioners advance (Pet. 16).

Further, the President's judgment as to what salaries are "advisable" is not unguided. The President acts only after he has obtained a detailed study from a Commission whose mandate is to review the pay rates for the offices covered by the Act and to recommend appropriate relationships both among those offices and between those offices and classified positions in the Civil Service (2 U.S.C. (& Supp. IV) 356). While the Commission's report is not binding, it provides a starting point for the President's decision. It is not sensible or necessary to review this statute on the assumption that the President will simply ignore the Commission's work.[8] The Commission's report

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appropriate" (one which bypasses the standards and procedures generally applicable (5 U.S.C. 5301(a)), if "because of national emergency or economic conditions affecting general welfare" the President considers it "inappropriate" to follow those standards.

[8] Indeed, the five Presidents who have made pay recommendations under the Salary Act have either adopted the Commission's recom-

also provides the Congress with information enabling it to exercise its role of reviewing and possibly overturning the President's recommendations. The Congress that enacted it understood that the Act would operate in this manner.[9]

The President's recommendations for compensation under the Act are also restrained by a matrix of related statutory and constitutional limitations on salaries. The Compensation Clause, Art. III, § 1, of the Constitution, prohibits reductions in the salaries paid to Article III judges, a large category of officeholders covered by the Salary Act. Further, "Congress has enacted an interlocking network of statutes to fix the compensation of high-level officials in the Executive, Legislative, and Judicial Branches * * *." *United States* v. *Will,* 449 U.S. 200, 202 (1980). This "network" includes, in addition to the Salary Act, the Federal Pay Comparability Act of

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mendations or, while scaling them down or stretching them out, provided an explanation for their departure from the Commission's proposals. Message from the President, *Salary Reform for Top Officials,* H.R. Doc. 91-51, 91st Cong., 1st Sess. (1969); 1976-1977 Pub. Papers 1068; 1980-1981 Pub. Papers 2867; 23 Weekly Comp. Pres. Doc. 11, 12 (Jan. 5, 1987).

[9] See 113 Cong. Rec. 28642 (1967) (remarks of Rep. Udall); *id.* at 36101, 36107 (remarks of Sen. Monroney). See also *Report of the Subcom. on Presidential Pay Recommendations of the House Comm. on the Post Office and Civil Service,* 95th Cong., 1st Sess. 9 (Comm. Print 95-4) (1977) (Commission's study provides "an empirical basis for the President's recommendations," insuring "that Presidential or Congressional action regarding the pay adjustments will not occur in a vacuum"). See generally *Industrial Union Dep't* v. *American Petroleum Inst.,* 448 U.S. 607, 676 (1980) (Rehnquist, J., concurring in the judgment) ("One of the primary sources looked to by this Court in adding gloss to an otherwise broad grant of legislative authority is the legislative history of the statute in question.")

1970, 5 U.S.C. 5305-5306, which establishes a mechanism by which Civil Service salaries are compared to and adjusted in light of salaries in the private sector, and the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, which provides for increases in the salaries of senior officials in the Executive, Legislative, and Judicial Branches tied to cost-of-living adjustments in the GS schedule. This network fixes a number of points which the President will, as a practical matter, take into account when formulating his recommendations under the Salary Act. For instance, the salaries of high Executive officials established under the Salary Act have to be considered in light of the figures for their subordinates set by the Federal Pay Comparability Act. The Commission in turn is required to state appropriate pay relationships between Executive officials and members of Congress (2 U.S.C. (& Supp. IV) 356). Any theoretical possibility of unrestrained Presidential action is limited accordingly.

In view of this combination of factors, the Salary Act sufficiently marks the "boundaries of the field of" the President's action. *Yakus,* 321 U.S. at 425. The statutory standard of "advisability," to which petitioners devote all of their attention, "need not be tested in isolation." *American Power Co.* v. *SEC,* 329 U.S. 90, 104 (1946). The narrow limits on the form of the President's action, as well as the Act's "factual background and the statutory context in which [it] appear[s]" (*ibid.*) foreclose petitioners' excessive delegation claim.

3. The congressional petitioners seek further review of the questions whether they have standing to pursue this action and, if so, whether their claims could properly be dismissed as a matter of judicial discretion (Pet. 17-19). In the same vein, the taxpayer petitioners seek reconsideration of *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa. 1970), aff'd, 401 U.S. 901 (1971), which they

conceded was controlling in the lower courts. While we disagree with the court of appeals' determination that the congressional petitioners had standing (Pet. App. 7a n.4), that court did hold that the merits were not appropriate for judicial determination under its "equitable discretion" doctrine. In this case, this difference in approach does not require further review by this Court.

a. Under the analysis applied in this case and in others, the D.C. Circuit has not allowed concerns arising from Article III to enter its analysis of the standing of individual Members of Congress. *Riegle* v. *Federal Open Market Comm.*, 656 F.2d 873, 877-878 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). Instead, those considerations are expressed through the court's "equitable discretion" doctrine, which applies when a congressional plaintiff can obtain a remedy through the legislative process. "Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute," the court of appeals will "exercise its equitable discretion to dismiss the legislator's action." *Riegle,* 656 F.2d at 881.

In our view, it is unwarranted to exclude from the analysis of standing concerns regarding the appropriate role of the Judiciary in resolving disputes between or within the other Branches. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright,* 468 U.S. 737, 752 (1984). Indeed, this aspect of standing should take on added significance when a case involves "relationships between the coequal arms of the National Government," because " '[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either.' " *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S.

464, 474 (1982) (quoting *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

More specifically, the congressional petitioners were granted standing in this case on the basis of allegations that the Salary Act has prevented them from exercising their legislative duty under the Ascertainment Clause and that their lawmaking powers have been diluted and diminished. See page 4, *supra*.[10] In our view, these allegations do not raise an injury that is " 'distinct and palpable' " (*Allen* v. *Wright*, 468 U.S. at 751 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)), nor do they give the congressional petitioners a personal stake in the outcome, as opposed to a " 'generalized grievance[ ] about the conduct of government or the allocation of power in the Federal System' " (*United States* v. *Richardson*, 418 U.S. at 173, quoting *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968)). At bottom, these claims of injury are only a restatement of the debate over whether the Salary Act is constitutional.[11]

The court of appeals held that the case should be dismissed based upon the "equitable discretion" doctrine.

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[10] See also, *e.g.*, *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) ("deprivation of an opportunity to debate and vote on the origination of" a tax bill in the House). In general, it appears that the D.C. Circuit will recognize as "injury in fact" any infringement on a legislator's "rights to participate and vote on legislation in a manner defined by the Constitution" (733 F.2d at 951).

[11] Even if a violation of the Ascertainment Clause constituted a cognizable injury, any such injury would be to the Congress as a whole, and not to its individual members. In the courts below, the Sergeant-at-Arms of the House of Representatives argued that the congressional petitioners, including those who are members of the House, lacked standing on the ground that this case involved an intra-Branch conflict. The Secretary of the Senate and the intervenor judges took no position on this issue.

While our view is that the dismissal should have been for lack of standing, this difference in approach—between a disposition expressed in terms of the court's discretion and one based on the limits of the court's judicial power—does not warrant further review in this case. First, the court of appeals' analysis of standing and its "equitable discretion" doctrine have so far been limited to the D.C. Circuit, and have not resulted in any conflict among the courts of appeals.[12] Second, since the D.C. Circuit has stripped its "equitable discretion" doctrine of any possible exception for cases that could not be pursued by a private plaintiff, that court's doctrinal framework will apparently require the dismissal of most suits by individual congressmen who would lack standing under our view. There is, accordingly, no urgent need to resolve this issue, particularly in a case where a dismissal is the result under either approach.[13]

[12] In *Dennis* v. *Luis*, 741 F.2d 628 (1984), the Third Circuit found that members of the legislature of the Virgin Islands had standing to challenge the Governor's attempt to appoint an "acting" Commissioner of Commerce, allegedly in violation of a statute requiring the consent of the legislature and the Revised Organic Act of the Virgin Islands, 48 U.S.C. 1597(c). While this case provoked a debate among members of the panel as to the validity of the D.C. Circuit's approach to standing and the "equitable discretion" doctrine (see 741 F.2d at 630-634; *id.* at 638-640 (Adams, J., concurring in part and dissenting in part)), much of that debate was unnecessary to the decision, which did not involve the separation of powers among the branches of the federal government. To our knowledge, the Third Circuit has not subsequently addressed the issue.

[13] We note that this Court has denied certiorari in a number of cases presenting the issue of congressional standing. *Melcher* v. *Federal Open Market Comm., supra*; *Moore* v. *U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *Crockett* v. *Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); *Vander Jagt* v. *O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); *Riegle* v. *Federal Open Market Comm.*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

Finally, as petitioners point out (Pet. 18), some members of the court of appeals have questioned the D.C. Circuit's approach to standing and its "equitable discretion" doctrine.[14] It is entirely possible that the court might hear these issues en banc if a case should arise in which points in dispute within the court would be decisive.

b. The taxpayer petitioners also urge the Court to consider whether taxpayers have standing to challenge alleged violations of constitutional provisions other than the Establishment Clause (Pet. 19-20). In *Flast* v. *Cohen*, 392 U.S. 83, 102-103 (1968), however, this Court made clear that a taxpayer will not have standing as such unless (1) he or she "allege[s] the unconstitutionality * * * of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution;" and (2) "show[s] that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power * * *." The Court has often reaffirmed these standards. See *Bowen* v. *Kendrick*, No. 87-253, slip op. 26-27 (June 29, 1988); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974); *United States* v. *Richardson*, 418 U.S. at 173-175; *id.* at 194 (Powell, J., concurring); *Valley Forge*, 454 U.S. at 476-482.[15] In fact, in *Richardson* v. *Kennedy*,

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[14] For instance, in this case, the members of the panel noted that they all shared concern over the doctrine of "equitable discretion" (Pet. App. 7a-8a (citing *Melcher*, 836 F.2d at 565 (Edwards, J., concurring), 565 n.4)). See also *Barnes* v. *Kline*, 759 F.2d 21, 41-71 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot *sub nom. Burke* v. *Barnes*, 479 U.S. 361 (1987); *Moore* v. *U.S. House of Representatives*, 733 F.2d at 956-965 (Scalia, J., concurring in result).

[15] The dissent by Justice Brennan in *Valley Forge* left open the possibility that taxpayer standing could exist to challenge exercises of the spending power premised on limits on that power other than the Establishment Clause. 454 U.S. at 507-508 n.18. Whatever the cor-

313 F. Supp. 1282 (W.D. Pa. 1970), aff'd, 401 U.S. 901 (1971), this Court summarily affirmed a decision by a three-judge court holding that a taxpayer's challenge to the Salary Act satisfied neither of *Flast*'s requirements. The lower court concluded in that case that Congress's authority to provide for payment of congressional salaries is "completely independent of the taxing and spending clause," because it derives from the Ascertainment Clause itself. 313 F. Supp. at 1286. It also held that the Ascertainment Clause "will not qualify as a Constitutional provision restricting the taxing and spending power" (*ibid.*). Those conclusions remain fully justified. Unlike the Establishment Clause, which can be conceived of as a prohibition on certain types of spending, the Ascertainment Clause, even under petitioners' view, at most limits the form that legislation establishing compensation must take and does not prohibit spending or require any particular level of spending or taxation. There is no reason to reconsider *Richardson* or to revisit well-settled principles of taxpayer standing in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Acting Solicitor General**

OCTOBER 1988

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rectness of that reservation, the Ascertainment Clause does not appear to be a limit on the spending power, as is the Establishment Clause.

* The Solicitor General has recused himself in this case.

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No. 88-352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SENATOR GORDON J. HUMPHREY, *et al.*,
Petitioners,

v.

NICHOLAS F. BRADY,
Secretary of the Treasury, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF CERTIORARI

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1. The principal reason for submitting this reply brief is to call the Court's attention to another case that it has agreed to hear which, like this case, presents a delegation question. In *Burnley v. Mid-America Pipeline Co.*, No. 87-2098 (Probable Jurisdiction Noted, October 3, 1988), the district court struck down a federal statute on undue delegation grounds. Although the statutory scheme at issue in *Burnley* is somewhat different from that at issue here — *Burnley* involves a statute that generates revenue for the federal government, whereas this action involves a statute which determines the rate of pay for high-ranking federal officials — the legal theories underlying both cases are the same: namely, that Congress failed to provide the decision-maker with the "intelligible principles" needed to make the determinations required under the statute. Given the similarity of issues, we submit that it would be desirable for the Court to consider the two cases together.

To be sure, there are differences in the legal arguments advanced by the parties and in the statutes themselves, but that only heightens the reasons for granting review in this case as well. Thus, in *Burnley*, the appellee relies heavily on the claim that the revenue-generating feature of the statute is in fact a tax in order to distinguish a number of other delegations upheld under seemingly analogous statutes, while here petitioners argue that the Ascertainment Clause of the Constitution provides a substantive limit on Congress' power to delegate determinations relating to congressional salaries. In addition, there are other differences between the two statutes, such as the different procedures by which the respective determinations are made. Moreover, judicial review is available under the *Burnley* statute, at least in some circumstances, while the Federal Salary Act at issue here has no judicial review provision, and the "deems advisable" language in it would render judicial review meaningless as a practical matter even if it were available.

But these differences counsel in favor of addressing the two cases in tandem. By considering the core legal question presented in both cases at the same time, the Court would have a far broader context for examining this vital question of constitutional law and a greater opportunity to give guidance to the lower courts and litigants. *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), and *In re Primus*, 436 U.S. 412 (1978) (two lawyer solicitation cases argued and decided together).[1]

2. With respect to the Ascertainment Clause argument, the Secretary recognizes that the question is whether the "'ultimate

[1]The petition in *Florida Power and Light Co. v. United States*, No. 88-234, raising issues very similar to those in *Burnley*, was before the Conference last week, but no action was announced on November 7, 1988, presumably because the petition is being deferred pending the outcome in *Burnley*, as the Solicitor General suggested. By contrast this case is unlikely to be resolved by reference to *Burnley* because of the distinctions described above.

authority' over, and thus responsibility for, Congress's compensation remains with Congress." Opp. at 11. The Secretary claims that the test is met here, just as it was in *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976), *aff'd*, 434 U.S. 1028 (1978), even though Congress could prevent the pay increase by use of a one-House veto in *Pressler*, while here Congress must pass a statute and override a certain presidential veto within 30 days after the President announces his decision. In other words, according to the Secretary, there is no difference between passing a law and exercising a one-House veto. If that were the case, then all of the battles leading to this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), were much ado about nothing. Neither the history of the legislative veto, nor of the various changes in the Salary Act described in our petition (pp. 3-7), in any way supports the notion that the two override mechanisms are equivalent for any purpose, let alone in order to satisfy the Ascertainment Clause.

3. Finally, with respect to the justiciability issues, the Court need not decide whether they would have warranted review independently because, if the Court decides to hear the merits, petitioners recognize that they must establish their right to maintain this action. Nevertheless, the Solicitor General's detailed discussion of his disagreement with the D.C. Circuit's doctrine of "equitable discretion," and his contention that, even in this situation, Members of Congress lack standing to challenge the denial of their constitutional rights, speaks eloquently of the need for this Court to review the question of the right of Members of Congress to maintain actions such as this. Similarly, his discussion of taxpayer standing only proves that taxpayers have not in the past been allowed to bring suits such as this, but does not establish that they fall outside the ambit of taxpayer standing authorized by this Court in *Flast v. Cohen*, 392 U.S. 83 (1968).

For the foregoing reasons and those set forth in the petition, the Court should grant the writ of certiorari.

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